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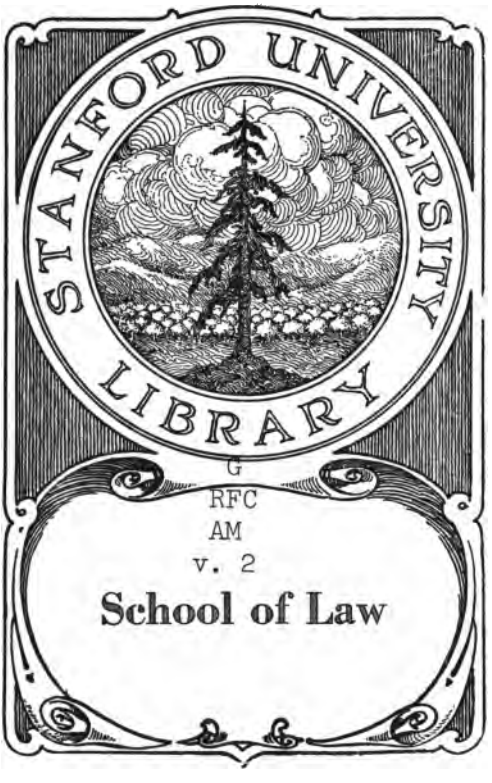

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Geo. B. Sanford

1878

2 vols

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Presented to Judge Washington
By R. Peters

ADMIRALTY DECISIONS

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE

PENNSYLVANIA DISTRICT,

BY THE HON. RICHARD PETERS,

COMPRISING ALSO

SOME DECISIONS IN THE SAME COURT,

BY THE LATE FRANCIS HOPKINSON, ESQ.

TO WHICH ARE ADDED

CASES DETERMINED IN OTHER DISTRICTS

OF THE UNITED STATES.

With an Appendix,

CONTAINING—THE LAWS OF OLERON.—THE LAWS OF WISBUY.—THE LAWS OF THE HANSE TOWNS.—THE MARINE ORDINANCES OF LOUIS XIV.—A TREATISE ON THE RIGHTS AND DUTIES OF OWNERS, FREIGHTERS, AND MASTERS OF SHIPS, AND OF MARINERS: AND THE LAWS OF THE UNITED STATES RELATIVE TO MARINERS.

IN TWO VOLUMES.

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1807.

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ADMIRALTY DECISIONS

IN THE

DISTRICT COURT OF THE UNITED STATES,

IN AND FOR THE

PENNSYLVANIA DISTRICT.

SEAMEN'S WAGES.

Woolf, Hundt, and others,
versus
The brig Oder.

1802.

Voyage broken up by seizure for debt. Extra wages claimed, and also the expenses of the mariners on shore demanded. One month's extra pay allowed.

A VOYAGE was broken up by a seizure for the debts of the owner. A claim for the wages, *pro tanto*, to the time of seizure was brought forward and allowed. Two months pay in addition were also claimed, under a practice in such cases: damages for the seamen's boarding and expenditures were also demanded.

The court not being satisfied entirely with the allegation, that the seamen were about returning to Europe, granted only one month's additional pay; it appearing, that although they were foreigners by birth, they had for some time past sailed out of America. The court held, that the granting this

Wolf et al. vs. the brig Oder.

Discretionary in the court to grant extra pay or not, and if granted, to fix *quantum*.

Damages for loss of time, and expenses on shore, sometimes allowed.

additional pay, was discretionary, both in *quantum* and principle. It varies in amount, according to distance from home, or the customs of different nations, and must entirely be controlled by circumstances. There have been frequent claims for damages, including boarding, loss of time, &c. while suits for seamen's wages were depending; but the judge said he had not been in the practice of giving damages; he perceived it was often done in foreign admiralty courts, and in many cases it would be just and proper; but it should be gone into with caution, and only where unwarrantable delay was produced by the fault of the owner or master. Seamen are often stimulated to litigation by landlords, who would, in such cases, be the only gainers, by damages allowed on account of boarding, &c. Suits for mariner's wages are seldom protracted. When they are legally and necessarily delayed, it will be most beneficial, both for commerce and the seamen, that they should leave their affairs in the hands of an agent, and prosecute their employment at sea.

SEAMEN'S WAGES.

Writer, administrator of Sheffer,
versus
The ship Richmond, Thackara, master.

1807.

A mariner affected with a severe pulmonic disease, shipped as an able-bodied seaman, to perform a voyage to the East Indies. He died of this complaint soon after the vessel left the port. The claim of his administrator to wages for the voyage was rejected by the court.

THE mariner Sheffer had shipped on board the Richmond to perform a voyage to the East Indies, and back to Philadelphia, He died on the outward passage; and now Writer, his administrator, claimed wages for the whole voyage. The decisions of the court in the case of the administrators of "Strum and Pagel *vs.* the Neptune"[a] were relied on by the counsel for the claimant.

The surgeon of the Richmond was examined, who stated, that Sheffer was affected with a severe pulmonic disease at the commencement of the voyage, and fell a victim to that complaint soon after the Richmond left the port of Philadelphia.—It was stated, that at the time he shipped, the master of the Richmond objected to him as not being able from sickness to perform the intended voyage, but he insisted on his being an able-bodied seamen, and as such was received on board.

The judge said he could not consider the claim of the administrator as well-founded. The principles established in former cases could not be applied to this. The mariner was not competent to perform the voyage for which he had shipped as an able-bodied seaman, and it was a fraud on his part to have represented himself as such. Merchants were not to be thus imposed on by mariners being placed on board their vessels to die, and thus to give a foundation to claims of this nature.

[a] Ante page 142.

Hindman, a mariner,
versus
Shaw, master of the brig Diligence.

1806.

A ship earned freight at one port of delivery; but was unfit to proceed from a port at which she touched in the progress of her voyage. The seaman refused to proceed in a vessel provided for the further transportation of the cargo, and claimed wages and an additional allowance. The court refused him wages or additional allowance, for the latter part of the voyage.

A SHIP had been at a port of delivery; and so far earned her freight. She sailed from Philadelphia on a circuitous voyage, and to return to that port. The seaman had shipped for the voyage. At a port, subsequent to her first delivering port, in Europe, she was found not sea-worthy. The cargo was re-shipped for its destination, in another vessel, freighted for the purpose; the seaman was offered a continuance of his contract, in the freighted vessel. He refused; and now claimed his wages to the time of the ship's incapacity to proceed; and two months additional pay, for his expenses and loss of time, in returning home. The extension of his claim beyond the wages due on delivery of the first cargo, was the chief point in dispute.

Court. This seaman comes before me with a barren case. I see no equity in his demand for the additional pay, and as little justice in his claim, after the delivery of the former cargo. The freight was earned to that time, and his wages attached to that fund. I do not feel myself warranted in allowing more than the wages to the first port, and for half the time of stay there. His refusal to continue his contract, though in another ship with the same cargo, is tantamount to desertion; and though there

Hindman vs. Shaw.

is some difficulty in bringing his case to that point, owing to the change of ship and strict construction of our laws; yet I think he has not a well-founded claim upon the freight, arising from the transhipped cargo, as he did not, though he had it in his option, assist in earning it. He cannot be entitled to the allowance, usual in common cases of voyages intermitted, by being broken up for the interest, profit, or convenience of the owner. In such cases, I always exercise a discretion according to circumstances, and allow from one to three months pay, in addition. On a careful enquiry, repeatedly made, I do not find any precedents, exactly ascertaining the additional allowance. Where I have thought them entitled, I have given to seamen *one* month's pay, in voyages broken up in the West Indies, or distant ports of the United States; *two* month's pay, if in Europe; and *three* months, if in India; and in one case, *four* month's pay, under peculiar circumstances.* In all cases of voyages broken up, I have allowed the merchant an alternative. If the seamen were accommodated with passages and supplies to bring them home, equivalent to the allowance, I have suffered this to be substituted for the additional wages. If births, on the terms of the original contract, were procured, and means of supply of necessaries, for the voyage of return, were

Voyage broken up for the interest of owner, additional allowance of wages given.

Allowances to seamen when voyages have been broken up.

A merchant may find the seamen their passage home or pay them extra wages.

* The passage to India being accounted equal to two and a half passages from the United States to Europe, I have deemed myself warranted, when uncommon circumstances urged the measure, to allow four months and upwards. I should not hesitate to allow more, in an extraordinary case.

Hindman vs. Shaw.

furnished, I have refused additional pay. The only laws in which I have found any rate of allowance fixed, are those of Spain. These seem to fix the rates, according to the place of breaking up the voyage, at certain designated proportions. But in general, it is a matter of discretion, and the true point of justice not always easy to be found. In some cases there is a distinction (as there is in claims for insurance) between a voyage broken up by the default of the owner, in sending a vessel to sea, found to have been unworthy in the outset, and one rendered so by unavoidable casualty. In the former case, the merchant is delinquent, and subjects himself to all consequences: in the latter instance, he is unfortunate, and entitled to equitable consideration.* It is somewhat similar to *wreck*, where

Spanish laws alone fix the allowance, which in general is discretionary.

Distinction between a vessel sent out not sea-worthy, and one becoming so by a casualty.

* Where seamen are sent home at the expense of the owner or master, they must be allowed for their time at the contract rate of wages. A change of the voyage, or voluntary deviation, is a breach of contract, and is governed by other principles than those which prevail when voyages are broken up from necessity or misfortune. The seaman must have his option to go the new voyage, on the terms of the old contract; if he makes his election to return home, he must be furnished with the means, and reasonable pay, according to the rate agreed. If the change or deviation is with intent to procure hands at less wages, or to afford an excuse for discharge of the mariners without lawful cause, wages for the voyage originally contracted for, are recoverable, and have been decreed. These are not singular cases: they have too often occurred. They fall within the principle, that full wages are due where the discharge is not for lawful cause. Anomalous instances, very atrocious, have been in proof: one, of a ship going out of her way, to put on shore two seamen, alleged to have been mutinous, but no testimony of this was exhibited; they were landed on a desart

freight, if goods saved, is due *pro rata itineris*, or *entire*, if sent to the place of destination. Seamen assisting in conducting the cargo to its intended port, participate in all the advantages; because they ensure to the merchant the acquisition of his fund, out of which wages are paid. But it is otherwise with those who will not afford their assistance, when both their interest and their duty require it. Nor do I think it material, where the seaman may, if he chooses, continue and fulfil his contract, *when* or *how* the vessel became unfit for the further performance of her voyage.

Hindman vs. Shaw.

island in the East Indies, to which a savage race of sea rovers occasionally resorted. These victims were stripped of all their clothes by the savages, and experienced every extreme of distress and disease, in a tropical climate, to which one of them fell a sacrifice. The survivor returned, and I adjudged to him wages for the voyage; and left other circumstances, to be investigated in another tribunal.

STEWARDS OF SHIPS.

Black, steward,
versus
The ship Louisiana.

1804.

A steward discharged in a foreign port.

A STEWARD of a ship belonging to Philadelphia, was discharged, for malconduct, at Liverpool, in England, where the vessel had delivered her cargo, and earned her freight, for that section of the voyage. On the ship's arrival at Philadelphia, he sued for wages during the whole voyage. He alleged that he had been discharged, at the foreign port, without lawful cause. It appeared, in proof, that the steward had carried on shore, and sold, a considerable quantity of cabin-stores and provisions, which had been left on board by passengers. He had, by landing these articles, endangered the ship, under the revenue laws of that country.

For the steward, it was contended—

1st. That the stores and provisions left on board by the passengers, were his *perquisites*.

2d. That if they were not, he had tendered amends and satisfaction, and offered to return to his duty, and should have been received, agreeably to the maritime law.

Remnants of ship-stores are not perquisites of steward.

Court. I am satisfied, on due enquiry, that the remnants of stores and provisions, are not perquisites of the steward. They commonly belong to the master, unless it is otherwise arranged, by the custom and usage in such cases. The passengers may, and often do select certain articles of extra

stores, for their own disposal; I find no positive, or legal regulation on the subject, much less, any giving a property in such stores, to the steward. If the fact or law, were, as is contended in this cause by the steward's counsel, it would be his interest to stint the passengers, that he might possess the remnants.

Black, vs. the ship Louisiana.

I consider the steward, as having been guilty of a flagrant breach of trust, and of embezzlement.

There is no proof of tender of amends and satisfaction. Such tender and submission, would operate favourably to a mariner, having committed a pardonable fault; but no amends, or satisfaction, can be made, for a *disqualification* or *incapacity*.

No amends can be made for a disqualification.

Although the *cook* and *steward* are authorized to sue in the admiralty court, as mariners and part of *the crew*, yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship. If the *cook* or *steward* is found incapable, from dishonesty, drunkenness, extreme filthiness, gross ignorance or negligence, to perform their duty, I have often ratified their dismission, with more latitude than that of mariners, who may know and do their duty, though guilty of temporary aberrations; and I have not deemed the master so rigidly *bound* to receive them though he may *consent* to the re-acceptance of their services.

Cook and steward may sue as mariners, yet in their duties are distinct.

If a steward is an habitual drunkard, if he grossly wastes, purloins and sells, the stores committed to his charge, it is lawful for the master to dismiss him. He renders himself unworthy of further trust, and is unfit for so confidential a station. If dismissed, the master ought not to be compelled to

The lawful causes for the discharge of a steward, and the master is not compelled to receive him again.

Black vs. the ship Louisiana.

receive him again. *Disobedience, casual drunkenness, passionate or insolent behaviour, accidental negligence*, or *carelessness*, may be overlooked and forgiven. During a long, or untoward passage, and with some masters as well as passengers any passage is a trial of patience and temper: stewards are often the objects of acidities, arising from other causes than their own conduct. Cooks have also their share, of such acrimonious effervescences. These place them often in situations, to revolt against what they deem unmerited ill-treatment; but it is their duty to suffer beyond the point of moderate forbearance.

Casual offences may be overlooked.

Amends may be made for offences, venial, or not inveterately vicious, and on submission, or tender of satisfaction, their sevices should be re-accepted. In such cases I have decreed wages; especially, when it required a more balancing, or nicely discriminating view of the subject than I desire to take, to determine who was most in fault. The solemnity of a contract, always should turn a doubtful scale.

But confirmed and incorrigible vice is a disqualification.

*But want of honesty is a *disqualification*, and not a pardonable fault in a *steward*, to whom are

* This is another exception to the general rule of obligation to receive a repenting member of the crew, tendering his service and amends. This rule may be tested by its exceptions; *exceptio probat regulam.* There can be no amends for a radical *disqualification.* Although I have often decided, that a repenting mariner, discharged even for *lawful cause*, should be again received, agreeably to the law of *Oleron;* yet I have not so decided, without limitation. One shipping for a seaman, who was utterly ignorant and incapable, whether from want of nautical skill or disease, *at the time of making the contract*—one dis-

committed the necessaries, conveniences and comforts of those on board. His duties are peculiar, and separate from those of common seamen. His case cannot, in many respects, be considered within the reason and contemplation of the rules of the maritime laws, applicable to mariners committing faults. I decree wages to Liverpool, deducting the value of the articles embezzled.

Black vs. the ship Louisiana.

Not within the rule for re-acceptance of mariners.

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charged as *really* dangerous to the peace and safety of the ship, or the property on board—notoriously dishonest and incorrigible—has never been held to be unconditionally entitled to a restoration to his contract. In such cases I have ratified the refusal of the master, to receive him, on any terms.

PERQUISITES CLAIMED BY THE SHIP'S COOK.

Thomas Parker, cook,
versus
The ship Calliope, Florimond; J. Dusar, owner and respondent.

DECREE.

1806.

Embezzlement charged on a cook for selling the ship's slush. Enquiry into the custom of the port, relative to this article.

THE respondent, the owner, allowed the claim of wages, but made a charge against the libellant for the amount of a quantity of *ship's slush*, valued at seventy-eight dollars and upwards, which he alleged the cook had embezzled, sold and converted the proceeds to his own use. The libellant proved by a witness, who swore that he was present when the agreement was made by the captain, that the cook should have the *slush*, in addition to pecuniary wages. The cook desired this to be entered on the articles, but the captain said his word was sufficient, and nothing was inserted but the wages to be paid in money; and the witness also asserted, that the owner assented. The same witness also declared, that the captain, after the ship's return, acknowleged the agreement with the cook, for the perquisite claimed. The clerks in the owner's compting house swore that no such conversation took place in their hearing, though they were present in the compting-house, at the time of the alleged transaction; and one of them was active in forwarding the business of shipping the men. A witness, who had been a mariner on board, on the ship's return from the voyage in question swore that the captain at

PERQUISITES CLAIMED BY THE SHIP'S COOK.

Parker vs. the ship Calliope.

Newcastle, on the Delaware, had given express permission to the cook to sell the slush, alleging, that it was offensive, and the sooner it was taken away the better. The same witness proves that the cook on the voyage, had mentioned, in the presence of or so near to the captain, that he must have heard him, his right to the slush. He also proves, that the cook was for some time sick, and the steward performed his duty, and was permitted to take and sell the slush, collected in that period. No direct testimony, to discredit the libellant's witnesses, was produced; but objections to the credit of the first witness, were founded on the improbability that the agreement should have been made, and the clerks not hear it, in a small apartment. No imputation was attempted on the character or credit of the mariner testifying to the transaction at Newcastle, save that the general incorrectness of seamen was hinted at.

An importance was given to this cause, by supposing that a general custom of the port for allowing the perquisite herein claimed to all ship's cooks was endeavoured to be established. A number of depositions were filed and read, disproving this custom, as a privilege to be claimed of right, though often allowed to cooks from motives of generosity. The danger of the permission was shewn, as it gave opportunities to fraud, by encreasing the quantity of *slush* with ship's provisions, at the hazard, in long voyages, of producing a necessity for short allowance to the crew. A point was made that no parol testimony could be received, as the article in writing expressed no such perquisite as part of the agreement.

Parker
vs.
the ship
Calliope.

No custom of the port to justify the claim by the ship's cook to the slush:

Court. I desire that it may be understood, that I do not ground my decision upon any general custom, by which ship's cooks can legally claim the perquisite to which the libellant alleges his right. Several years ago, I investigated an alleged custom, that stewards should, of right, have the remnants of cabin stores after the voyage ended; and decreed they had no such right. There is no such general custom, as that of cooks having, of right, the slush; and, therefore, in this case, it can only be claimed under the special agreement.

It appears to me, that the shipping articles contemplated by the act of congress, do not necessarily require these supplementary grants of additional benefits to be inserted. The privileges to mates, &c. are never specifically written in the articles; which seem only calculated for pecuniary agreements. Therefore, parol testimony may be given of such extraneous matter.

My decree will be formed solely on the point of the alleged *embezzlement.*

I should have hesitated to have given perfect credence to the first witness, who swears to the agreement in the owner's compting-house, were his testimony not corroborated by the mariner who swears to the captain's licence, confirmatory and executory of the agreement originally alleged. The captain was the agent of the owner; and if he has made an agreement, or given privileges contrary to the owner's interest, or instructions, he is responsible. The cook cannot be charged with embezzling an article carried away and sold by the express license of the master. Here are two affirmative witnesses, swearing expressly to the point of an agreement, and

PERQUISITES CLAIMED BY THE SHIP'S COOK.

a posterior ratification and license. These witnesses I am legally bound to admit in proof. I cannot reject them as unworthy of credit, from any general prejudice, which it is my duty not to indulge.

Parker vs. the ship Calliope.

Wages decreed to the libellant, amounting to one hundred and fifty dollars, with costs.

Wages decreed.

M'Quirk, and others, mariners,
versus
The ship Penelope.

1806.

Wages, otherwise lost, were claimed because the merchant had received insurance on the freight, and refused.

A CLAIM for wages for the voyage was instituted against a merchant, whose ship had been carried in by a belligerent, adjudicated, and ship and cargo condemned in the court of the captor. A point was made, that the owners had received insurance on the freight, and thereby the fund for paying wages was restored.

Court. This point has often been made and over-ruled, and must be at rest, in this court. I have constantly held, that the insurers have all benefits accruing to the owner; and are not answerable to mariners, nor is the owner, in such cases. The fund for paying wages was lost to the owner by the condemnation, as much as if no insurance had been made. Seamen cannot, it is held, directly, insure wages; and if so, it ought not to be done circuitously, through the owner, who would in that case, lose so much of the insurance, for which he, and not the mariners, paid a premium. If, indeed, a ship be forfeited by the misconduct of the owner, and the seamen are not amenable to consequences, this may be shewn against the owner, whether he is insured or not. The contract for insurance is between the owner and underwriters; and the seamen are third persons, neither parties or privies to the agreement. If the freight be lost, the claims of mariners cannot

Wages cannot be insured.

Ships forfeited by the owner's misconduct.

M'Quirk et al. vs. the ship Penelope.

Seamen contract, with full knowledge of the course and nature of our trade.

Freight paid by captors, wages decreed—refused, if the loss is paid by the insurers.

be aided by the precaution of the merchant, who for compensation, procures others to bear his risks. Seamen generally know, as well as merchants, the nature of our commerce; and enter into contracts, under its circumstances. Freight being lost, is the ground of recovery against underwriters; but it is the reverse, as between owners and seamen. Capture, as much as wreck, extinguishes the fund, if the loss be total; and there is no difference between the effects of loss, in the one case or the other. In some instances, where the goods were condemned, and the freight paid by the captors, I have allowed wages to the seamen, but never where losses have been paid by underwriters. I consider the cases to stand on very different grounds. The freight is saved by treaty or the laws of nations, in the case of payment by captors, and there is no difference, *quoad hoc*, whether the ship had earned it, by arrival at her port, or the amount paid in this way; but in the latter case, the freight must be actually lost to the owner, to induce a payment by the underwriters, not of the freight, but (for a reward previously given) an equivalent, or compensation, for its loss.

Bell, and others,
versus
Sloop Ann, and cargo.

DECREE.

1807.

The ship Belvidere fell in with the Ann at sea, deserted, abandoned, and in danger of sinking. The Ann was brought into the port of Philadelphia, by a part of the crew of the Belvidere, and libelled for salvage. The court allowed one half of the net amount of the sales, as salvage.*

THE libel, and the depositions and exhibits, in support of it, state, that on the 8th day of October 1806, the ship Belvidere, Michael, master, owned by Bell, and others in the libel mentioned, in north lat. 38 deg. 42 min. and 60 deg. W. fell in with the sloop or cutter Ann. Her name blacked over, so as scarcely to be discernible: she had been loaded with fish; part whereof had been thrown overboard. Her situation was critical, having been stripped and deserted by her officers and crew. On taking possession of her, about forty barrels of fish were thrown overboard to lighten her. She was taken in tow by the ship, and brought to Philadelphia the 29th of the same month, with great labour and difficulty. She arrived within the capes of Delaware, on the 21st. A gale of wind blew hard for near three days in the bay, and put the ship into difficulties for want of hands, and required great labour and exertion of those on board the sloop, to prevent her loss.

The sloop was full of water when boarded, and had neither sails or rigging; but these were sup-

* See the cases of salvage, ante pages 31, 48, 70, 87.

Bell et al. vs. the sloop Ann.

plied from the ship, which towed the sloop upwards of a thousand miles. The chief mate of the ship, with Frederick Collins, John Holme, and the boy Jacob, were put on board the sloop when taken possession of, and so continued until her arrival at Philadelphia. Their duty was to attend to the sails, steer after the ship, keep her free, and other necessary business, both before and after her separation from the ship.

The value of the vessel and freight, as it is stated in the policy and freight list, amounting to more than $12,000.

I see nothing in the principles of this case, to distinguish it from cases of salvage, frequently occuring here. In the facts, there is much merit and some singularity. I think it is among the few cases of vessels entirely deserted, and left without any part of the crew, to their fate. This may cause an appearance of hopeless dereliction; but it is no more so than that of goods thrown overboard, or found *floatsam*, or *ligan*. The value of the ship and freight has its usual influence. It operates, on a comparison with the amount of property saved, to increase the proportion of salvage, from that allowed where the reward is greater, when the fund out of which it is granted is more ample. I increase or diminsh this proportion, according to the amount of the articles saved. Proportions of the amount of sales either in gross or nett, or in the total value of the articles, where their value is found by appraisement, are not so much rules with me, nor should they be, as the sum actually received by the salvors. If the property saved is considerable, the proportion is less; if small, the ratio is greater; so

Bell et al. vs. the sloop Ann.

as to produce a sum, in my mind sufficient, to reward the salvors, and encourage others. This must be regulated by circumstances, and an attention to the interests of the owners, as well as the claims of the salvors. If the amount is small, it is a casualty of which they must take the hazard. They can only have a reasonable reward, in a fit proportion of the property saved, whatever may be the property risked. I have never heard of any losses accruing to ships, while saving lives or property at sea. In the instances, and they are not few, I have generally had before me, no more profitable employment could be found for the ships, or their crews, engaged in the risks and dangers so much relied on, for swelling rewards as cases of salvage; be this as it may, the due weight of such circumstances has never been overlooked. As to labour and difficulty, one cannot nicely balance and weigh them; they being generally produced by circumstances incapable of estimation. Some advantages accrue to ships taking on board the crews of perishing vessels; they always assist in the navigation, and often in the salvage. In the present instance the Belvidere had no such advantages; and being obliged to divide her crew, her risk was increased, and they experienced more difficulties: but I know not how to make this a matter of pecuniary calculation. The officers and crew always participate in the amount allowed to the ship; their proportions are greater or less, as the total of salvage is great or small. I gave my opinion, and mentioned my practice on this head, in the case of the Cato,[a] in these words—" I cannot depreciate the

[a] Ante page 61.

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services performed by the officers and crew of a vessel of small value, by making that the rule for reward, either as it respects the owners of the vessel saving, or of the property saved. Nor can I inflate a case of little merit, by augmenting the salvage, in any thing like the proportion of value of a vessel and cargo of great amount." If the whole amount of salvage be but an inadequate reward, the men who stake their lives and apply their labour, must be considered in remuneration, equally with the owners of the ship and cargo, alleged to be put to hazard. It is an extra duty and voluntary service, to which mariners cannot be legally compelled, and must be invited.

As to any argument founded on the total dereliction by the officers and crew of the deserted vessel, I see not its force. The owner of the derelict, as it is called, may sometimes be benefitted by signals and exertions, made by any or all of the crew remaining in his vessel; but I do not see that because his case, [illegible] wanting such benefits, is the more hopeless, the conduct of the salvor becomes more meritorious. I have always considered the saving the lives of the officers and crew of a perishing vessel, the most valuable and laudable part of the transaction. I have never esteemed the amount of the property recovered, worthy of comparison with it; much less does it deserve to be elevated in the scale of merit entitling to greater pecuniary reward, than that allotted to those who save lives, as well as property. I confess, that if my obligations in the station I fill, justified me in yielding to my sensibilities, I should reward those who saved

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life, in a far greater degree than the salvors of property. I think the policy of encouraging risks to save lives in jeopardy, should warrant a preference in reward of the former, much beyond that allowed to the latter. At any rate, it would be highly discouraging, imprudent and unjust, to increase the compensation and premium, because no lives were saved, when the property was rescued from destruction.

Considering this case under every aspect in which I have viewed it, and it being one wherein the property recovered is not very considerable, and, of course the property saved is in less proportion to that risked, and the labour and difficulty of securing it have been great, I allow for salvage, one half the net amount of sales, to be divided as directed in the case of the Cato;[a] save that the first mate, and hands put on board the sloop Ann, are to receive half a share more than those on board the Belvidere, on account of greater peril and additional exertion, after parting with the ship during the storm in the bay of Delaware. I very cheerfully follow the precedent prescribed to me in the case of the Blaireau,[b] and give the boy Jacob an entire share, to be received by himself, and for his own use, for this extra duty. It is true that the officers and hands on board the Belvidere, had their portion both of labour and difficulty; but I think those in the deserted vessel, with less means and worse accommodations, were more perilously situated, espe-

The seamen put on board the Ann, allowed a greater proportion of salvage.

[a] Ante page 69.—[b] Cranch. Rep. vol. ii, p. 240.

cially after parting with the ship: a hazard they encountered, during the whole of the passage, in a vessel not thought safe or seaworthy, by its own officers and crew. Additional encouragement should be given to such adventurous salvors, from motives both of policy and justice.

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SALVAGE.

William Small, and others,
versus
Goods saved from the schooner Messenger

1807.

Goods taken from a wreck, libelled for salvage, and one-third of the gross amount decreed by the court.

THE libellant, master of the brig Catharine of Norfolk, on the 5th of September last, in lat. 37 deg. N. and long. 68 deg. W. fell in with the wreck of the schooner Messenger of Baltimore, White, master, having lost both her masts, sails and rigging; the captain, mate, and eight hands remaining alive, seven of her crew having perished. After a vain endeavour to put the schooner in a condition to proceed on her intended voyage from Baltimore to Vera Cruz; the libellant and crew took out of the wreck and saved from destruction, sundry articles in the libel mentioned. The hardships of the officers and crew of the Messenger are described, and it is said in a deposition, not admitted as legal proof of all the facts, that the captain of the schooner, the mate, and one hand, were taken on board the brig, and the rest of the surviving crew were admitted into the ship Unicorn, bound to Bremen, which ship saved, and carried on her voyage, a more considerable quantity of the cargo of the schooner. The articles saved by the brig Catharine were carried to Madeira, and brought from thence to Philadelphia, occupying the room of about fifty barrels freight, valued at one hundred and twenty dollars, the cargo of the brig being dis-

placed to receive the goods so saved. These facts are agreed by John Craig, one of the owners of the vessel and cargo of the schooner Messenger—and that the schooner was abandoned and left at sea.

Small et al. vs. Goods saved from the Messenger.

Court. There is no claim by the owners of the cargo of the brig Catharine, nor does there appear any very peculiar merit in this case, to distinguish it from the common cases of saving goods out of vessels (under like circumstances) in the labour or difficulty of saving: but it is, among others, a striking instance of the impediment to saving goods out of a perishing vessel, interposed by the cargo of the vessel employed in the salvage. Much more of the Messenger's cargo would have been saved, if it could have been admitted into the brig Catharine. This is not a circumstance favourable to the arguments advanced for rewarding owners of the cargo of the saving ship; when, in general, a vessel in ballast is most capable of, and commodious for, receiving goods out of perishing vessels; and it relieves me from some difficulty as there is no claim, on this account, by the owners of the cargo.

Under all the circumstances, I think it right to allow as salvage, one-third of the gross amount of sales, clear of all costs and charges.

This is to be divided between the owners of the ship and the officers and crew of the brig Catharine, in like manner as was directed in the case of Taylor and others against the brig Cato, heretofore decreed in this court.

Therefore, I adjudge, order and decree as follows, to wit. The gross amount of sales, as appears by the marshal's return, is two thousand eight hundred and sixty-four dollars, and thirty-nine

Small et al. vs. Goods saved from the Messenger.

cents. Of this sum I adjudge, order and decree, that the libellant, on behalf of himself and all others concerned, have and recover in full satisfaction, for and as salvage, the one-third part, or nine hundred and fifty-four dollars, and seventy-nine cents, to be apportioned as follows:

Messrs. Olivera, Fomandey & Co. of Norfolk, owners of the brig Catharine, shall receive and take one-half of the said sum of nine hundred and fifty-four dollars, and seventy-nine cents, or $ 477 39

The remaining half of the said sum of nine hundred and fifty-four dollars, and seventy-nine cents, shall be divided amongst the officers and crew of the said brig Catharine, as follows, to wit.—The same shall be divided into twenty parts or shares, whereof,

William Small, the master, shall have eight shares, or $ 190 96

Samuel Wilson, the mate, shall have four shares, or 95 48

Salvage allowed to slaves on board the Catharine.

James Parker and Robert Sennett, white men, and negroes William, Joe, Europe, Lewis, Jerry and Peter, slaves, all seamen, shall each have one share, or twenty-three dollars, and eighty-seven cents, 190 96

477 40

$ 954 79

SALVAGE.

Small et al. vs. Goods saved from the Messenger.

The negroes William, Joe, Europe, Lewis, Jerry and Peter, being slaves, are nevertheless to receive their proportion of salvage, as mariners on board the brig Catharine, for their own separate use. And all costs, duties and charges are to be deducted from and paid out of the remaining two-thirds of the gross amount of sales, and the balance to remain in court, subject to further order and decree.

SHIP FITTED OUT BY THE MAJORITY OF OWNERS.

Willings & Francis, and Samuel S. Cooper,
versus
Peter Blight.

1800.

THIS was a petition to permit the majority of owners to proceed with the brig *Amelia* on a voyage, after giving stipulation for value of the recusant owner's share.

In this case the proceedings will shew the course originally taken by the parties.* The court was clearly of opinion that the cause was one of admiralty

*To the honorable RICHARD PETERS, *judge of the district court of the United States, in and for the Pennsylvania district.*

The petition of Willings & Francis, and Samuel S. Cooper,

RESPECTFULLY SHEWETH,

Petition.

That your petitioners are owners of three-fourth parts of the brigantine Amelia. That your petitioners are desirous of sending the same vessel on a voyage to St. Sebastians in the kingdom of Spain, and from St. Sebastians back to Philadelphia.

That the remaining one-fourth part of the same vessel belongs to Peter Blight of the city of Philadelphia, merchant, who refuses to join in the said voyage, or to suffer the same vessel to sail on your petitioners' own account.

Your petitioners therefore respectfully pray, that this honorable court conforming to the established law and usage of the admiralty, will grant a citation returnable at the next court day to the said Peter Blight, to shew cause, if any he hath, why your petitioners should not be admitted to give security for the safe

Willings et al. vs. Peter Blight.

jurisdiction; and that it had power to authorize the majority of owners to fit out and expedite the vessel on a voyage to be designated in the stipulation, and it directed accordingly.

The question of freight was accommodated; and the court gave no final judgment. An opinion was however intimated that no freight was legally demandable by a recusant owner, who would neither sell at a reasonable appraisement, or make advances for outfit; but his share of the vessel should be secured to him, that as he gains no profit, he may incur no loss. It appeared unreasonable, that those who were prepared, and desirous to put their property into a state of activity, should use their funds

Freight not legally demandable by recusant owner; but his share of the vessel must be secured to him.

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return of the same vessel, and thereupon proceed with her on the said intended voyage.

WILLINGS & FRANCIS,
SAMUEL S. COOPER.

August 16th, 1800.

The words "and from St. Sebastians back to Philadelphia," inserted in the libel on motion.

In the District Court of Pennsylvania.

Willings & Francis, *versus* Peter Blight.

Answer.

The answer of Peter Blight of the city of Philadelphia, merchant, to the petition of Willings & Francis and Samuel Cooper, respectfully sheweth, that the respondent admits that the said petitioners are owners of three-fourth parts of the bri-

Willings et al. vs. Peter Blight.

disproportionably for the benefit of a delinquent owner.

During the progress of the cause the following opinion was given by the court.

Whether the minority shall or shall not be compelled to sell, has not, in the opinion of the court, been here judicially determined. It is asserted,[a] that if the majority of owners refuse to fit out, they are compellable to sell at a valuation; and so are part-owners, deficient and unable to fit out the vessel. This majority or minority, means those who hold the greater or less proportion of property. In the Sea Laws, 3d ed. 442, it is said, that "upon any probable design, the major part of the owners may,

Major part, in value, may fit out against consent of the minority; though they must communicate the design.

[a] Beawes, Lex. Merc. 49.

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gantine Amelia; but this respondent avers that before the filing of the said petition he had assigned all his property, real and personal, whatsoever and wheresoever, to George Blight, Thomas Murgatroyd, and William Cole, in trust for the benefit of his creditors, and therefore he is no longer owner of the remaining one-fourth part of the same vessel, nor entitled without the directions, authority and approbation of his said trustees to join in the voyage in the said petition mentioned, or to suffer the said vessel to sail on the said petitioners' own account. And this respondent further answering saith, that he believes his said trustees would be willing, as he himself would be, to join in sending the said vessel on any voyage for the general benefit of the owners, provided such voyage was truly and fully made known to them; but the said petitioners have not set forth to what place or places it is intended to send the said vessel after her arrival at St. Sebastians; and this respondent has been informed and avers that it is not intended that the said vessel should return from St. Sebastians immediately to the port of Philadelphia, but that she should be employed by the said peti-

even against the consent, though not without the privity and knowledge of the rest, freight out their vessel to sea."

"If it should so fall out that the major part, in number, protest against the voyage, and but one left that is for the voyage, yet the same may be effected by that party, if there be equality in partnership."

"If it falls out that one is so obstinate, that his consent cannot be had, the law will enforce him either to hold or to sell his proportion; but if he will set no price, the rest may rig her out, at their own costs and charges, and whatsoever freight she earns, he is not to have any share or benefit in the same. But if such vessel happens to miscarry, or to be cast away, the rest must answer him his part, or proportion, in the vessel. But if it should fall out, that the

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tioners in a long, hazardous and circuitous voyage, not mentioned or described in the said petition.

And this respondent further answering saith, that the petitioners have not in their said petition offered to purchase the late share of the respondent in the said vessel assigned as aforesaid to his said trustees; nor have they offered to sell the said vessel and distribute the money among the owners in proportion; nor have they offered to give security for paying any part of the profits of the voyage or freight of the said vessel, to this respondent or his said trustees, nor have they offered to give security for the return of the said vessel within a limited time. Wherefore and because this court has not jurisdiction of the case, the same not being a civil cause of admiralty and maritime jurisdiction, inasmuch as the said vessel was at the time of filing the said petition and now is within the body of the district of Pennsylvania, and not upon the high seas. The respondent prays that the said petition may be dismissed with costs, &c.

A. J. DALLAS, *proctor for the respondent.*

SHIP FITTED OUT BY THE MAJORITY OF OWNERS.

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major part of the owners in value, refuse to set out the vessel to sea; there by reason of the inequality, they may not be compelled; but then such vessel is to be valued and sold: the like, whether part of the owners become deficient, or unable to set her forth to sea." The 6th art. of the 23d section of the ordinances of *Louis* XIV of *France*, enacts, that "No person may constrain his partner to proceed to the sale of a ship, except the opinions of the owners be equally divided about the undertaking of the voyage." Here "equally" means equality of property.

Laws of France.

It is a principle discernable in all maritime codes, that every encouragement and assistance should be afforded to those, who are ready to give to their ships constant employment; and this, not only for the particular profit of owners, but for the general interests and prosperity of commerce.

If agriculture be, according to the happy allusion of the great Sully, "one of the breasts from which the state must draw its nourishment," com-

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And now this twenty-second day of August, 1800, It is ordered by the court that the petitioners be permitted to send the brigantine Amelia in the petition mentioned on a voyage from Philadelphia to St. Sebastians, and back to Philadelphia, upon their entering into stipulation in the sum of six thousand dollars with approved security, as well for the safe return of the same vessel to Philadelphia, as for the payment to the said respondent, his heirs, executors and administrators, of one-fourth of the *freight** of the same vessel for the said voyage out and home, deducting all reasonable and just mercantile charges.

* Freight was inserted agreeably to the consent of the majority of owners.

merce is certainly the other. The earth, the parent of both, is the immediate foundation and support of the one, and ships are the moving powers, instruments and facilities of the other.—Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop, and finally perish, if either be permitted to remain entirely at rest. The former will less ruinously bear neglect, and throw up spontaneous products; but the latter require unremitted employment, attention and enterprize, to ensure utility and profit.

A privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct, on indolent, perverse, or negligent part-owners.

The following authorities were cited and furnished by the counsel, on the questions which arose in this cause.

The jurisdiction of the court of admiralty. Denied—Hard 473. Carthew, 26. Allowed—1 Lord Raym. 223. 2 Stra. 890. 2 Lord Raym. 1285.

Stipulation must be—1st. To secure safe return from the voyage, or pay value of share. 2d. Within a stipulated or reasonable time.

Voyage must be designated. Though the vessel be put to sea without consent, the minority should be informed of the voyage intended. Molloy, 220. Lex. Merc. 52.

Freight, to dissenting part-owners. Denied—2 Cha. Ca. 36. 1 Vern. 297. Ambler, 255. See Viner, vol. 6. Tit. Mariners. Allowed—1 Show, 13. Ibid. (*) 6 Mod. 162. Fitzg. 197. Skin. 230.

See also Treatise on Commerce, vol. i, p. 29. Browne's Civil and Adm. Law, vol. ii, p. 131.

* The cause having ended in a compromise, these authorities were not all read or examined.

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The *drones* ought not to share in the stores, acquired and accumulated by the labour, activity, foresight and management of the *bees*. Although the *hive* may be common property, it is destructively useless to all, if not furnished with means of profit and support by industry and exertion; which should be jointly applied by all, before they participate in beneficial results. Nor should the idle and incompetent be permittted to hold it vacant and useless to the injury and ruin of the industrious and active.*

* This point seems not yet to be so decided as not to admit of question. The authorities in the British books, lead to opposite conclusions; and leave the subject liable to controversy.

BOTTOMRY.

The following opinion was given by Judge Peters, in the Circuit Court of the United States. It contains, in epitome, the principles of decisions in sundry causes in the District Court; and it is therefore deemed proper to be added to the Admiralty cases, as being a subject of that jurisdiction.

Rucher & Co.
versus
Conyngham, surviving partner.

1805.

Case stated. Under what circumstances the master is authorized, by the general powers legally incident to his station, to hypothecate the ship for repairs.

The ship America, belonging to the defendants, having on board a very valuable cargo, consigned to the plaintiffs, met with very considerable damage, and arriving in England, was placed under the care of the plaintiffs' house there. The cargo was sent on by other conveyances; and the ship America, having undergone very expensive, and,

In the District Court of the United States for the Maryland District—present the hon. JAMES WINCHESTER.

Wilmer,
vs.
The Smilax.

Libel on a bottomry bond.

1804.

The libel in this cause was founded on a bottomry bond for two thousand dollars, hazarded on a specified voyage, which voyage was never performed; but instead thereof, the vessel performed a different voyage, and was afterwards sold by Smith (who executed the bottomry) to Grace, the claimant, who alleged himself to be a *bonâ fide* purchaser, claiming an exemp-

Rucher & Co. vs. Conyngham.

it is presumed, necessary repairs, was in the Humber, put up for freight, previous to her return to Philadelphia, where she arrived. It appears by the correspondence of Messrs. Rucher & Co. that the repairs of the ship were applied by the persons acting for the plaintiffs' house, on the credit, and for the account, of that house; and not solely, or in any wise, under the idea of a pledge of the ship. It appears also, that the plaintiffs assented to, if not

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tion from the bottomry, on two grounds—1st, that the bottomry never attached; and, 2dly, if it did attach, that the remedy thereon could not be pursued *in rem.* after an intermediate voyage, to injure a fair purchaser. The claimant wholly failed in the proof of his being a fair purchaser: indeed the evidence produced, afforded strong ground to presume that the sale set up was nominal and fraudulent;. but his counsel strongly pressed the opinion that the bottomry never attached, as the contemplated risk was never run, and especially if it did, that not pursuing the remedy in time, that is, when the vessel returned to port, but permitting her to go a second voyage it could not now be pursued—there was no question raised as to maritime interest.

Court.—Your argument amounts to this—that if a mortgagee, does not instantly on his debt falling due, take possession of the mortgaged premises, he looses his security. The *hypothecation* of a ship by the maritime law, is on the same footing as a mortgage of chattles on land, is by the common law. And the plain distinction in cases of this kind, is between liens arising by implication of law, and those which result from express pledge: the former may be lost by parting with possession, on which they depend, or evidence of other equivalent circumstances, but the latter depend on very different rules.

The bottomry stipulates, that the vessel shall, with all convenient speed, proceed upon the voyage on which the money was taken up, and if lost during that voyage, that the obligee shall lose his money. The objection that the bottomry did not

directed the advance of, the monies for the repairs, for account of the defendants, and without any reference to the pledge of the ship, *at the time*. A bottomry bond was however taken, by the agents of the plaintiffs' house in England; whether with their orders or not does not appear, but for their use, and for the amount of the expenses of repairs, at a premium of twenty per cent. making the sum of eleven hundred and sixty-six pounds sterling.

Rucher & Co. vs. Conyngham.

attach is founded upon the defendant's own allegation, of the breach of his own contract and duty. I cannot conceive that that circumstance can alter the nature of the contract. It was originally a contract of bottomry, or it was not. If it was, the act of one of the parties, cannot alter its nature. The written contract is plainly a contract of bottomry; and it can never be permitted to a defendant, to rely upon his *own default*, to injure the rights and diminish the security of a fair creditor.

The libellant's counsel considering this case, like the case of an insurance, which does not attach where the contemplated risk has not been run, again pressed it on the court—I did not see sufficient cause to change my opinion.

On mature deliberation and revision of that opinion, I can see no reason to think it erroneous.

The contract of bottomry, has probably been in use from the earliest periods of foreign commerce, and its long recognition stands in the place of all reason, as it respects public policy. In questions resulting from that contract, as constituting the *jus pignus vel hypotheca*, the interest of individuals is more to be regarded than that of the public. And it is not to be doubted, that he who takes upon himself the hazard of loss for the benefit of another, will adopt the best method of securing himself, and look to all the securities the law allows, and in aid of that personal responsibility and sufficiency which the law creates by the very act of a loan, will rely on the thing—*Quia plus cautionis in re est, quam in persona.* Dig. c. 106.

The contract of bottomry may be either for a limited time, or upon a whole voyage; and in both, the lender has the same

BOTTOMRY.

Rucher & Co. vs. Conyngham.

The maritime interest and legality of the bond disputed

Great utility and sacred obligation of contracts of bottomry, where necessary and legal.

The question on this part of the cause is, "Whether the bottomry bond be lawfully taken; and the defendant, of course, who does not dispute his liability to the payment of the amount of repairs, answerable for the maritime interest, charged on that instrument."

There are no contracts more worthy of the attention of the courts of a maritime nation, than such as are grounded in the true principles which

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securities, to wit, the person of the borrower, and the thing on which it is loaned: and runs the same risk, to wit, a total loss, if his money is *effectually* hazarded. I say effectually, for it must be out of his own separate power to recall the hazard and rescind the contract; and I hold it to be effectually hazarded when the contract is once completed, and the employment of the money depends upon the sole volition of the borrower.

The general analogy between this species of contract and that of insurance is very striking, but there are some differences very material to be attended to. The insurer parts with no funds or property until the misfortune arrives. The lender on bottomry deprives himself of his funds and property from the moment of the contract, and risks their entire and total loss—he hazards his money too, to a person who by the application to borrow on bottomry, announces a decline or embarrassment of his affairs. The contract of insurance by its terms imports, that the obligation on the underwriters to make good a loss arises only when that loss happens. The contract of bottomry, on the other hand, implies an immediate pledge and security defeasible upon a future event: the first is a personal contract simply—the latter a contract of pledge, as well as personal security; in cases, therefore, between the insurer and the lender upon bottomry, the latter is preferred. There has not been, to my knowledge, any judicial decision upon the immediate question whether a bottomry in such a case attaches. Nor can I find such a question ever stirred by English elementary writers. A strong evidence that the objection is not solid, since the very

ought to actuate the parties entering into engagements of the nature of this now under consideration. These bonds are called by sir William Scott, and so treated by all courts and writers on the subject, "*bonds of great sanctity, and highly necessary in mercantile affairs.*" The greater their sanctity, and the more indispensable their necessity, the more carefully they should be guarded, and every diversion from their necessary or sacred usefulness, prevented or discouraged.

Rucher & Co. vs. Conyngham.

This should inducecaution to prevent their being diverted to improper purposes.

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term bottomry imports *hypothecation* by the maritime law—but there is much stronger evidence than any which results from the silence of jurists, to be drawn from principles which must be admitted to apply between insurers and lenders upon bottomry.

I will suppose in this case for a moment, that the brig Smilax was insured for the voyage she actually sailed; and that upon her return voyage she was so materially injured by perils of the sea as to warrant an abandonment to underwriters as for a total loss, and a contest arose between the lender on bottomry, who should have the benefit of the salvage goods. If the insurer, in this case, must give way, I think it will not be contended that the owner can stand against the bottomry creditor.—That the insurer in such case, is to be postponed to the creditor on bottomry, is I think, very clear.

By an abandonment, the insurer is placed in the situation of the insured whom he represents, and can have no greater right than the insured had.

The lender upon bottomry loses remedy only when the ship, &c. is *wholly lost;* and where a part is preserved, they are esteemed as his proper goods, being presumed to be the product of his money. He therefore takes preference of the insurer. See 1 Valin. 262, iii.

But in this case it is admitted, that if the voyage on which the money was intended to be hazarded, was not proceeded on, it resulted from the voluntary determination of the borrower.

BOTTOMRY.

Rucher & Co. vs. Conyngham.

Circumstances and causes justifying bottomry bonds. 1. For the safety and progress of the ship.

The power of the master to hypothecate the ship, is circumscribed by known boundaries; these must be rigidly adhered to, and are generally marked for the security of absent owners, and to prevent abuses by masters, to their injury. The hypothecation is therefore required—

1st. To be absolutely necessary for the safety of the ship, and to enable her to proceed on her voyage, and not for any other debt or demand,

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It cannot be denied, that when he undertook to perform that voyage, he virtually promised not to go on another, or exercise the lender's hazard. Good faith and common honesty required, at least, that he should not do any act to injure the lender, or increase his risks. The lender on bottomry looks for this integrity, and to the security so pledged. He is deceived in the honesty of the borrower, who may be insolvent, and upon that failure to discharge a moral duty, is attempted to be bottomed a principle which shall go to the further length of depriving the creditor of his security, on which he must be supposed principally to have relied. Thus by fraud, in the only act in his power, a foundation is laid to erect a more extended superstructure of iniquity, that the fraud which cannot be directly perpetrated, may nevertheless form a legal stock, on which to engraft other frauds, and produce more extensive injuries. Is there any case, or principle, or opinion, in any system of law, which will warrant a claim of protection, founded on an admitted violation of duty? Can there be any colour for such doctrine in a court of equity, and against a fair and equitable creditor.

Does the underwriter, or the lender upon bottomry insure the *honesty* of the man with whom he deals, or does the law hold out a temptation to him to commit iniquity that he may reap its fruits?

The only hazard or peril which the insurer or lender upon bottomry runs, is the perils of the sea. They are answerable for no act of fraud or misconduct of the insured on the borrower. If they were at any time to be so affected, I can see

either precedent or co-existing for other purposes, or on other accounts, or even for similar supplies on other voyages.

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2d. It must be made in a strange port, and not in the port where the owners reside; and evidence of its reasonableness and necessity should be obtained and produced.

2. In a foreign port, and not where the owners reside

3d. It must also be where none of the owners are present, and where the master has no goods,

3. Not when the master has goods of his own, or o the owners.

no reason why at every period of the voyage they should not equally be affected. The true rule is, that the lender upon bottomry loses all remedy, if the vessel does not return to port, by perils of the sea, &c. or is lost without the fraud or fault of the owner.

If a declining to proceed on the stipulated voyage at all destroys the *hypothecary* right of the lender, it would equally be destroyed, if when she performed one half of the voyage, the borrower changed her rout and destination, for in such case the whole risk, according to arguments of the claimant's counsel, was not run; and the same reason would apply with equal force, in any case where the route was changed by the misconduct of the borrower, as carrying enemies' goods, being captured, taken out of her course, &c. or in any similar case. That the lender on bottomry has his remedy from the time of his contract, is not only proved by general principles—by the decisions that the borrower cannot insure his interest—that the lender may insure his principal—but by express decisions on the point.

On the 5th of September 1754, captain Candole borrowed of Mr. Barratier one thousand livres on bottomry of the polacre St. Estienne, giving his brother Francis Candole security for a voyage to the Levant, at the interest of ten pounds per cent. for six months, and so pro rata until her return, not exceeding three years.

After navigating one year, the captain died at land, and the command of the vessel devolved on Faudon, his mate.

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For he may pledge goods, freight and ship, or may sell part of the cargo to repair the ship.

4. There must be no other means of procuring money.

(or those, if he hath goods, insufficient) either belonging to his owners or himself; for he may pledge the goods and freight, as well as the ship, or may sell a part of the cargo to repair the ship.

4th. It is essential to the lawful exercise of this power, that no other means of procuring funds, at the place required, should exist. Of course, if the owners have agents or consignees who have either funds or property to furnish, or are bound to afford means, on the personal credit of the owners, this power in the captain is excluded.

In January 1756, the vessel arrived at Cypress, the 20th of the same month, the crew presented a request to the French consul that the vessel might be examined, offering to re-embark if she was judged navigable. The examiners reported, that the vessel might sail many years, if refitted: the expense of a proper refit was estimated at from eleven to twelve hundred piastres. On the 23d, the consul ordered Faudon to proceed without delay to repair his vessel—he remonstrated that he had no money—the consul renewed his order.

On the 3d of February, Faudon not being able to obtain the money necessary for repairing the vessel, declared that he abandoned the vessel to be sold by the consul, for the most advantage, to those interested. In consequence, the consul sold the vessel for nine hundred piastres, out of which he paid the crew. The purchaser refitted the vessel and employed her in commerce.

On the 22d of June 1756, the assignee of Barratier, the lender of bottomry, brought a suit against the heir of captain Candole and his security, for the whole sum lent, together with the maritime interest up to the time of the sale. The defendant alleged that the vessel being unnavigable, the plaintiff could only recover the amount of sales, deducting the amount of wages, &c. The plaintiff replied, that the vessel was not found wholly unfit for sea, but only required repairs; and that if the captain had not found money to refit, it was a matter

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5. Sum loaned must be at risk, and only on the faith of the ship.

5th. The sum loaned must be at risk, and there must not be a personal responsibility; that is, the money *must be advanced on the faith of the ship*, and at the sole risk of her loss or safety.

These circumstances are indispensably necessary, to constitute the legal authority of the captain to hypothecate the ship; without them he has no power, as *master*, to pledge, by any instrument, the ship or freight. I say nothing here of the mort-

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which concerned them only, and not the lender on bottomry or insurers. Upon this statement of facts, the admiralty of Marseilles, on the 19th of July, decreed for the whole sum lent, and the whole maritime interest.

This case is very peculiar—the length of time the vessel had been employed in navigation afforded strong presumption that the reparation which had become necessary was from the ordinary perils of the ocean. The original captain was dead; the substitute was at a very remote place, out of all probable correspondence with his owner—where credit might naturally be supposed difficult to obtain—and where there was no imputation of fraud or wilful misconduct. But it was a duty imposed by law on ship-owners who take up money on bottomry, or insure them, to keep them sea-worthy, from port to port. Going to sea when not properly provided, is an increase of the risk of the lender or insurer, which the owner has no right to produce. And, says Valin, in observing on this case, I have no doubt of the correctness of the judgment upon the facts stated. Such excuses are always suspicious; but if the insufficiency of the ship really arose from perils of the sea and was fully proved, it would justify the defendant.

Let this decision, and the facts on which it rest, be compared with the case before the court, and who will say that there is a pretext to support the claimant's defence?

On this point Zouch is explicit (Elem. 398) *Item quæsitum est an fœnoris nautici præstatio evitanda sit, cum navigatio impedita est, culpa nautæ debitoris? Responsum. Quod ex præcipite de-*

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gages, or bottomries, given on ships by owners: for although they arise out of the usages and maritime arrangements before stated, and are generally regulated by the same principles, yet the power to originate them is in the owner, in his own right; and is not one thrown upon him, as it is upon the captain, by the operation of law, and the necessity of the case.

Tested then by the positions and principles before stated, it will appear, that the bond in question

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bitoris audacia contingebat; creditori ascribi, publici juris rationem non permittere. And this is a consequence drawn from a rule of maritime law, derived from the civil law, which is a full answer to every argument of the risk not having been run, in consequence of the voluntary change of the voyage by Smith.

De conventione præstandi periculi quæritur, an id damnum prestandum sit, quod cui culpa sua contingit? Et visum quod qui navigationis periculum in se suscepit, intellegitur periculum quod casu, non quod culpa domini contingit in se suscipere. (Z. E. 428.) So in case of freight unladen before the voyage commenced.

These principles are so strongly supported by all the considerations of equity, justice and moral rectitude, that I should reluctantly embrace a contrary rule—I feel very confident in their legal correctness, but even laying them out of the case, I think there is enough to support the decree.

The only ground taken to deprive the libellant of his lien, is, as before noticed, that the risk contemplated was not run. The evidence upon which the argument rests will not, on strict legal principles, warrant the inference deduced—What is the contract?

The libellant loans to the owner of the Smilax, for her outfit to sea, the sum of two thousand dollars, on two conditions—one, that she shall with all convenient dispatch proceed to sea upon a specified voyage; and the other, that if lost in the prosecution of that voyage, the money loaned is not to be reimbursed.

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Hypothecation by the master cannot be for securing engagements not founded solely on credit of ship. Cannot be for advances on the personal credit of owners.

was not given under some of the most essential requisites on which the power of the master is grounded. I add to these positions, as a corollary, that an hypothecation bond must not be diverted from its original and sacred use, to the purpose of securing engagements, not at first founded merely on the credit of the ship, but for advances made on the personal credit of the owners, either *voluntarily*, by their consignee, agent or friend, or at their request; nor, of course, can it be given as *a double security*, running along with, and in aid of, a personal responsibility. The one excludes the other, and they cannot exist together. The risk being solely confined to the ship, is the only justification allowed by the laws of all commercial countries for the maritime interest; or, as it is sometimes called, *usury*, or *premium*.

The contract of pawning, or pledging, by way of bottomry, must necessarily precede the right to take possession of the ship, since that relates to future acts and events, which must take place before the ship can be seized or taken possession of. The right to exercise the power of reducing into possession, is necessarily contingent, but the right is not the less perfect when the contingency happens; the vessel must therefore be considered as mortgaged and bound from the date of the bottomry bond, to take effect in possession, like any other contingent interest, when the contingency happens. It is an interest which he might lawfully insure, and would not be open to the objections of a wagering policy—I speak of the principal sum only.

If the vessel had duly proceeded upon the stipulated voyage and performed it, it is not doubted but the libellant's claim would be sustainable. I cannot conceive a reasonable ground of discrimination between a case, where a right is admitted upon the happening of two contingencies upon which it is limited to take effect, and the case of a right limited to take effect upon

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In this case, to my view, it indubitably appears, that the advances for the repairs done on the ship America, (the amount, description, or necessity whereof do not appear by such authenticated documents, as ought to accompany such a transaction) were so done on the credit of the owners; and not on the exclusive, or even partial credit, or intended pledge of the ship: that the plaintiffs, or their partners or agents in England, had in their hands, goods and property of the defendants, which had been in the power and possession of the captain, liable to be pledged, or in part sold, if the occasion warranted, who was therefore not, on this account, in a situation of remediless necessity, and total incapacity to raise funds, otherwise than by the pledge of the ship: that it appears, the plaintiffs were in the habit

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the happening of one, out of two alternative events, on which it is limited to take effect, and which is the case before the court.

The lender only authorized his money to be put at hazard upon a particular voyage, in the event that that voyage was proceeded upon with all convenient dispatch; but she did not proceed agreeably to the contract, on that voyage, but prosecuted another and different voyage. The right of the lender then, by the terms of the contract, to call for his money back, was complete the moment the vessel sailed upon the new voyage. But from the moment of the loan, until the time the vessel commenced her new voyage, the money was risked by the lender, and at least during that time, being at hazard, it was embraced by the contract.

It is to be remembered, that this opinion is applicable to the case of a libellant claiming a return of his loan, and does in no shape involve the consideration of the question of interest, or the power of this court to moderate maritime interest—agreeably to the circumstances, and in proportion to the actual hazard incurred by the lender.

of giving credit to the defendants, at the time of this transaction, and the circumstances of the defendants were not then in anywise doubtful; if this were essential to the point. It is also clear to me, that the plaintiffs continued to hold the defendants personally liable, thereby taking away one of the ingredients before stated to be essential to the validity of an *hypothecation* by the master.*

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The facts of this case, in a great degree, if not entirely, supersede the necessity of discussing the question of the propriety of a *consignee* taking a bottomry bond *from the master*, in virtue of the power given him *merely as master*. I will only say, that in general, I think there is a legal impropriety and invalidity in such bonds. The practice may lead to abuses and collusions, to charge the owner with unwarrantable and unnecessary usurious premiums. But I will not say that there may not be cases, where the consignee is not bound, more than any other lender, to advance for repairs, without taking the ship as security for a loan on maritime

Whether a consignee may take a bottomry bond, and under what circumstances.

* In the times of the pride and power of the Romans, their propensities were military, and their pursuits in character with such inclinations; but their *patricians*, having necessities for wealth to supply expenditures induced by luxury and dissipation, employed their slaves and freedmen in commerce, thereby eluding a law prohibiting their having *personally* any concern therein. These subordinate ministers to the gainful objects of those who could not themselves directly carry on trade, were regulated by their laws; and their duties and responsibilities designated and settled as well by positive laws, as by judicial decisions. Their *exercitor navis*, answered to our supercargo, and their *navicularius*, held a similar station to the present ship or sailing-master; the latter exercised then, as he does now,

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interest. A consignee not in the habit of dealing with or crediting an owner, and not having any goods, funds or means of security at the time, seems not under any obligation to risk his property, without the usual and adequate compensation and security.

The amount of repairs to be charged; but bond and premium declared illegal by the court.

On the whole I am of opinion, that if the amount of these repairs be properly proved, they must be charged against the defendant; but that the bottomry bond, and the premium in consequence, are illegal, and ought not to bind or be charged in this case, under its particular circumstances.

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when solely entrusted therewith, the duties of both. He still retains some of these duties and responsibilities, though the power over the cargo is lodged in the hands of the *exercitor*, or supercargo, for general purposes. In 2 Emerigon, 420, 1, 2, the subject is concisely treated, according to ancient laws and customs, existing in the time of the Romans. In Abbot. (Ph. ed.) 78, among other authorities, the modern situation of these characters, in our ships, is investigated and discussed. Their duties and responsibilities are pointed out, both as they respect their employers, and those with whom they contract, so as to shew when and to whom they are amenable, in implied or positive obligations. It will also be seen to what extent their principals are answerable, for their conduct and engagements. The remedies at law, have some resemblance to the *actio exercitoria* of the Roman codes.

PRIZE.

John Moxon and others, subjects of the king of Great Britain,*
versus
The brigantine Fanny whereof one of the libellants, Michael Pile, was master.

1793.

The brigantine Fanny was captured within five miles of cape Henry, and brought into the port of Philadelphia. The owners of the Fanny claimed her, and prayed that she might be restored to them, she having been taken within the territorial jurisdiction of the United States, but the court dismissed the libel for want of jurisdiction.

THE libel states, that the libellants were the true owners of the brig Fanny, now in the port of Philadelphia.

That on the night of the seventh of May last, the said brig, being on her voyage from the island of Jamaica to Baltimore, and near cape Henry, was hailed in the English language, from a small schooner, who enquired if they wanted a pilot: that they answered in the negative, and not suspecting they were near an enemy, continued their course all night, and at day break next morning, found themselves within five miles of cape Henry, when and where they were boarded and made prize of by sundry armed men, belonging to the armed schooner Sans Culottes, commanded by J. B. P. A. Ferey, and the officers and crew of the said brig made prisoners—

That the cargo enumerated in the libel was the property of the persons respectively therein named, being the libellants—

* See the case of the ship William, ante page 12.

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That they do not admit that the said schooner was duly commissioned to capture British vessels, or property—

That the said brig at the time of her capture was on neutral ground, within the territorial jurisdiction and under the protection of the United States, who are now at peace with the king and people of Great Britain: and the said J. Ferey had no authority or permission from the United States to capture British vessels or property within that distance from the sea coast, to which by the laws of nations and those of the United States the right and jurisdiction of the United States extend.

They, therefore, pray restitution of vessel and cargo, and damages for detention.

To this libel J. B. P. A. Ferey put in a plea to the jurisdiction of the court; and in his plea sets forth—

That he was at the time of the capture of the brig Fanny duly commissioned by the French republic, as captain on board the armed schooner Sans Culottes, belonging to citizens of the said republic, to attack all the enemies of the said republic wherever he might find them, &c. which commission he is ready to shew, &c.

That so being commissioned he took as prize, the said brig, &c. belonging to British subjects, at open war with the French republic, and brought her as prize into the port of Philadelphia, &c.

That by the laws of nations, and the treaty of amity and commerce with France, it doth not pertain to this court to hold plea, &c.

He, therefore, prays to be hence dismissed, and the brig and cargo discharged from arrest, &c.

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A copy of the commission, as stated in the plea, was shewn and by consent, was admitted.

The libellants reply, That the libel ought not to be dismissed, because—

1. That the brig Fanny and cargo were unlawfully seized and taken within the territorial limits of the United States, by the said J. B. P. A. Ferey, and divers citizens of the United States, the said United States then and now being at peace with the king and people of Great Britain.

2. That the said schooner Sans Culottes was unlawfully armed, manned, victualled and fitted out within the United States, with the citizens thereof on board her, to cruize within the domain and territorial jurisdiction thereof, against the king and people of Great Britain, and against the citizens and subjects of Holland, with whom the United States were then and now are at peace.

3. They deny that the said J. B. P. A. Ferey was duly commissioned; or that the schooner Sans Culottes belonged to the citizens of France, at the time of the pretended commission; or that the French republic then had any authority to grant a commission for her to cruize, as an armed vessel, against the friends of the United States. They, therefore pray sentence according to the prayer of the libel.

The defendant rejoins by protestation, &c. and relies on his plea as before stated.

The several matters mentioned in the replication in addition to those in the libel were abandoned, or were not insisted on by the advocates for the libellants, and the cause put on the ground of the libel.

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The arguments were much the same with those in the former cause of the ship William, with the addition of some new matter; and, therefore, I consider this in the nature of a re-hearing of the point determined in that cause.

The arguments, either explanatory or additional, seem to be—

1. That by the more ancient authorities,[a] it appears that, if at that day, the prize was carried into neutral territory, the admiralty might restore, and the owners were not divested of the property, if it were not carried *infra præsidia* of the captors, and condemned in a court of admiralty. It is allowed that the custom of selling prizes in neutral ports, has altered this law: but the authorities shew that, before the custom of selling, the courts had jurisdiction, and if the property were not changed, before this practice of selling took place, it is not changed here, because taken in neutral territory, and the capture unlawful; and, therefore, the courts here have the jurisdiction the admiralty possessed before this custom of selling prevailed.

2. That the act of taking being illegal, it can give no right. Every sovereign is owner of the soil of his country, and the jurisdiction over a certain extent of sea-coast, and this jurisdiction should be acknowledged by the whole world. And though it is not well settled how far territorial limits extend on sea-coasts, the most approved writers agree the distance to be three leagues. That within these

[a] Lex. Merc. 206, 207. 227. Inst. of Adm. 7. 219. Molloy 41. B. I, c. ii, § 21.

limits there is no war; and, therefore, there can be no prizes lawfully made. That the laws of nations forbid fitting out privateers in a neutral country, or capturing within its limits, friends of the neutral. These acts are penal and liable to punishment. If the property is not restored and compensation made, it is a cause of war, as it also is if neutral territory is invaded by the nations respectively affected by either of these circumstances. And, if we shall be under the necessity of paying for the property taken in our territory, the captors will, in part, carry on their war at our expense. It is acknowledged, that we have no concern with captures lawfully made; but this is no lawful capture, and we have a right to exercise our jurisdiction in this case. The proper means to do this is through our courts of justice, who have cognizance of all invasions of our jurisdiction and territorial rights.

3. That we do not here investigate the question of prize, but pursue a remedy for a *marine trespass*, a subject evidently within the jurisdiction of our admiralty courts.

4. That, however it may be with the sovereignties of other nations, ours is divided into executive, legislative, and judiciary; and, by the constitution, the judiciary have cognizance of all cases of admiralty and maritime jurisdiction. It, therefore, rests with them to give a remedy in all such cases, and this court is particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations, &c.—and this is a case falling under that description.

5. Much argument and discussion were used on

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the subject of Palachi's case. It was said that this case was originally a prosecution for piracy under a British statute; and therefore the reasoning and determination of the judges do not apply to it. But by the same case, as reported in Bulstrode, it appears that a prohibition was refused to the admiralty who took cognizance civilly and adjudged restitution. That the cases on which the report in the *Exposition de Motifs*, &c. was made were different from the present case; and, therefore the petitions of those who made that report being founded on the cases under their consideration, do not, in any respect, apply to the case in question. It was, however, agreed that whatever be the proper decision as to legality of prize, or limits of territory, the question always recurs,—What department of government is vested with the power of enquiring into it, and giving the remedy?

To these were added many arguments of inconvenience and policy. The prize here may be sold without enquiry, if this court will not make it; but in France their courts would examine into circumstances and prevent injustice. If the capture is wrongfully made, the captor will not carry it to France; and even there, in the case of the most valuable ship, there is nothing to which the injured party can resort but the privateer bond: therefore, if carried to France, restoration would be made if the capture is illegal. But here if the court will not take cognizance, it must be sold, and there is an end of redress. By bringing property into our ports captors submit to our jurisdiction.

That the silence of the books is owing to admi-

ralty cases not being published, and cases of plunder brought into neutral ports are uncommon.

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Arguments for the captors.

On the part of the captors the arguments made use of in the case of the William, were repeated, and much was said in answer to the reasoning of, and authorities produced by, the advocates for the libellants.

The doctrines laid down in the exposition, &c. were relied on as to the law of nations, and the treaty was called the sheet-anchor on which the captors depended. It was contended that the treaty forbids the courts from interfering, but the right of diplomatic interference was not denied; nor were the arguments on this side extended further than as the subject related to captures by one enemy from another. An objection was taken to the parties libellants, who, it was said, had no power to sue and recover on the point of violation of territory, which did not give rights to parties at war, but merely affected the neutral nation. It was acknowledged that a capture in a neutral territory was an offence to the neutral, and that the neutral government might order restitution. But this is a matter of state policy, not of judicial proceeding. If the United States were a party, it might alter the case; but here are only belligerent parties.

That as to the case of Palachi, in Bulstrode, it must be misreported, or some circumstances existed, not now appearing, as it differs in the general positions from those laid down by my lord Coke in his Institutes, where civil as well as criminal proceedings are mentioned. That the authorities out of sir Leoline Jenkins are all founded on references

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from the king to him, and he does not give judgment, but refers the remedies to royal authority.

The doctrine of *infra præsidia* was denied, and it was asserted that the property was vested by capture as to the enemy; that though it may be a trespass as to the neutral, the taking vests the right in the captor, and the trespass done to the neutral is a subject for him to enquire into and obtain redress, but not for the party at war. And it appears by the British instructions to their privateers, that they are of opinion that a prize may be taken on neutral ground if the government of the neutral permits it.

That if there are no adjudged cases in favour of the captors, there are none on the other side, and both are on an equal footing in this respect.

One of the advocates entered largely into the point of territorial limits, and shewed the uncertainty in which it was involved.

It was said that these limits must be settled by treaty; and by treaty, if it were deemed right, a power in the neutral courts to judge of prizes taken in neutral bounds ought to have been vested, for it cannot be assumed without the consent of the sovereign of the party making the capture. The inequality of remedy was also insisted on; there can be no reciprocity, where the one party may be obliged to restore, but cannot have condemnation of the capture.

I have re-considered the arguments adduced on a former occasion as well as those brought forward in this case. I shall say nothing on the new ground taken in the replication, because it is not insisted

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on by the replicants. This being a public point, I have been desirous of hearing all that could be said upon it; if I am still of the same opinion I delivered in the former case, it is not because I indulge the petty and inflexible pride of consistency, but because I am not convinced that my former decree was erroneous. It is not with pleasure, that I continue to differ with the advocates for the libellants in this or the former cause: I have a sincere deference for their opinions in general, but my duty will always prompt me to follow the impressions the subject produces in my own mind. If these are erroneous they must be set right by an appeal to a superior tribunal, in whose decision I shall very cheerfully acquiesce. I shall be obliged to be more diffuse than, in common cases I wish to be, as the subject has been ably and extensively discussed by the advocates on both sides of the question, and it is a point of public consequence. I will avoid, however, as much as possible, going into minute investigation, and confine myself, chiefly, to general principles.

The doctrine, advanced on the part of the libellants, that it is necessary for the complete transfer of property to the captors, that the prize should be carried into their territories and there condemned, seems to present itself as the first object of investigation. It appears to me that much of the argument, founded on the authority of the old cases is built on this doctrine. I am not satisfied that this opinion was at any time well founded. If the old cases produced shew that prizes brought in *solo amici* were considered as subjects of cognizance

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Capture complete before the prize is brought *infra præsidia.*

in neutral courts, because the capture was not complete, not being carried *infra præsidia* of the captors, I cannot be convinced that they should have the weight contended for, if they were more explicit and certain than they appear to be.[a] And I think that on a careful inspection of most of these cases it will be seen that the civilians[b] then founded their opinions as to admiralty jurisdiction, in captures brought in *solo amici*, upon this principle. If this were the case, these authorities ought not to govern us; *cessante ratione, cessat lex.* To adduce them to shew that courts now have the authority exercised when the doctrine of *infra præsidia* prevailed, in cases of illegal captures, does not strike me forcibly; because, if the authority was then assumed on fallacious principles, it amounts to nothing more than to found one error upon another.

The general positions,[c] that the property taken is not changed until brought into the ports of the captors, appears, even by the old authorities, merely to relate to the rights of postlimine and salvage, on re-capture. The instance of captures at sea, given by Grotius, recognizes the true reason on which ancient writers found their opinions, *viz.* that "the capture is then complete when all hope of recovery is lost." It is lost if carried within a fleet of the sovereign of the captor, or, "by the *modern law* of nations, it is sufficient if these kinds of things have been during twenty-four hours in the power of him who took them from his enemy."

[a] Lex Merc. 206, 7, 227. [b] Molloy, 41. Inst. of Admiralty, 219. [c] Grotius de J. B. & P. L. 3, c. 6, § 3, n. 3.

PRIZE.

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[a] Goods taken from an enemy on land and re-captured, shall be the property of the re-captor, unless re-taken the same day and claim put in before sun-set.

[b] Goods or ships must be brought into port and continue *infra præsidia* a night, "so that *all hope of recovery be lost.*"

It is then, only required that "*all hope of recovery be lost,*" to establish the principle; and the going into the territory, &c. are only mentioned as *instances* and not *requisites:* so that it does not appear by these authorities, some of which are cotemporary with Palachi's case, that it was essential to a complete capture, that it should be carried into the captor's territory.

[c] Burlemaqui has cleared up this point in his Principles of Politic Law, c. vii, § 16 and 17.—"The prizes taken from an enemy become the property of the captor as soon as they are taken, The truth is, this distinction" (carrying or not *infra præsidia*) "has been invented only to establish the rules of the right of postlimine or the manner in which the subjects of the state, from whence something has been taken in war, re-enter upon their rights, rather than to determine the time of the acquisition of things taken by one enemy from another."

Prizes taken from an enemy become the property of the captor immediately.

In the case of Goss *vs.* Withers, in 2 Burrow,[d] this doctrine is discussed: it is there shewn, that the enemy acquire a property by the mere occupation, where all hope of recovery is lost. A case men-

[a] Freem. 40. [b] Bynker's. L. 4. de R. B. [c] Burlemaqui, 233, 4. [d] 2 Burrow, 683, Justinian's Inst. b. 2, tit. 1, § 17.

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tioned in page 694 of that book, was on a former occasion relied on, as bearing on the case in question.

Restitution to the British owner was decreed against a vendee or re-captor, in the time of Charles the Second, of a ship having been fourteen weeks in the possession of the enemy, and re-taken by a British privateer. Another is there cited from Lucas, p. 79, upon the same principles, against a vendee, after a long possession, two sales and several voyages. Yet Woodeson, vol. ii, p. 441, expressly says, that "by alienation of a capture to subjects of a neutral power, the property is become irretrievable as to the original proprietors," and vide post 443. But lord Mansfield justly observes, that most of the rules on this subject are arbitrary, and not the object of reason alone. They are contrivances of nations in favour of their own subjects and to prevent too easy transfers to neutrals. Every nation,[a] for the benefit of its own citizens, makes what rules it pleases as to the recovery by the owner of the property re-taken. But what has a neutral court to do with such arrangements? They relate to the adjustment of salvage between subjects of the same nation, but have no operation between one enemy and another. For with respect to them, "the ship is lost by the capture though she be never condemned at all, nor carried into any port or fleet of the enemy." If then the ship is lost to the enemy, from whom it is captured (the mere capture being held sufficient to ground a claim of insurance) what new title can he acquire by coming into the port of a neutral and becoming party to a suit for

Rules relative to capture are arbitrary.

[a] Burlemaqui, P. N. and P. L. 224. [b] 2 Burrow, Goss *vs.* Withers, 683.

recovery of his former property? The court were of opinion, in the case first mentioned, that the question "whether by the capture the property was or was not transferred to the enemy," could only happen in two cases. 1st. Between the owner and a neutral purchaser. 2d. Between the owner and the recaptor. If a third case had existed, my lord Mansfield was too accurate not to have added it, to wit—between the owner and his enemy in a neutral court. But he had given a contrary opinion, and knew no such case ought to occur.[a]

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It therefore seems to me that cases, grounded on the doctrine of *infra præsidia*, and condemnation in a court of admiralty of the captors, are not sufficient guides in this question. All that is said about this doctrine is not to be understood as relating to the parties at war; for, as to them, the capture is complete when made. But in support of the rights of postlimine, in cases of re-capture, this necessity of bringing into port, condemnation, &c. is asserted to settle the matter between the former owner and the recaptor. So that the salvage paid, is different at the will of nations who make regulations obligatory on their own subjects, according to the time the prize had been in the enemy's possession. These are different in different nations: a neutral subject has nothing to do with them, except he becomes a purchaser; he must then examine into them merely to see what situation he will be in as to his purchase, if it falls into the hands of the nation to whom the former owner is a subject.[b]

[a] Vide Binkers. de R. B. b. i, c. 15, p. 191. [b] Vide 2 Woodeson, 441, 442, 443.

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But how this right of postlimine would operate in such case is not the subject of enquiry in a neutral court. It has no relation to a dispute between enemy and enemy, and never can operate so as to warrant their carrying on against each other, in a neutral country, *a war of suits*. But whether a sale be or be not good, is not the present question: it is a capture by one enemy from another, which gives, at least, *prima facie*, the right. It is not material now, whether, as some contend, the person making a capture has only a *possessory* or an *absolute* right.[a] Be this how it may, as to the captor, the former owner is by the capture totally divested of his property: the captor takes it as a subject of a belligerent nation, and in the first instance for his nation.[b] The intervention of a court of admiralty of the captor is made necessary, not to give validity to the capture but to inquire into the circumstances, and give the captor his reward by transferring to him the right of the nation, and the court will not vest it in him if the capture is improperly made. This view of the matter shews in a stronger light, that the whole is a *national concern*. Neutral courts or private individuals, are not clothed with authority to vindicate or carry on national contests; but these disputes must be settled by sovereignties alone. The capture being originally for the nation at war, is national property, and as such, the neutral, anticipating the justice of the belligerent sovereign, whose subject has done the wrong, and at the same time vindicating the rights of its own sovereignty and neutrality, may seize and restore the prize when

[a] 2 Bur. 689. [b] 2 Woodeson, 446, 7.

the neutral territory is invaded in making the capture, if the property is within its power: if not, he may demand restitution and satisfaction from the sovereign of the captors. If this demand is refused, he may obtain what he requires, by reprisals or war —modes of redress far beyond the reach of judiciary tribunals.

The reasoning founded on the supposed illegality of the prize is a *petitio principii*. For the question is how that is to be ascertained? The discussion about neutral territory is another question, which lies between the sovereign of the captor and that of the neutral nation.[a] The rights of neutrality were not established for the benefit of belligerent parties. They only affect the neutral; and invasion of these rights is an offence to him and not to the party at war. When Cheline who had a commission from the French, then at war with the Dutch, took a ship of the latter near the port of Dublin, the capture was not held piratical, or as to the Dutch unlawful. But it was criminal and unlawful as to the English sovereign, who was a neutral, and the ship was lying under his protection.[b] The party whose property is taken in a neutral country calls on the neutral sovereign to assert these rights, for the protection of those within the territory. If this cannot be done by negociation, it resorts to force, the only law among sovereigns where they differ upon public points. There seems, therefore, no small weight in the objection made to the party libellant. It does not seem proper that a suit, found-

The question relative to the invasion of neutral territory is to be determined by the government of invader and the neutral.

[a] Grotius, de J. B. & P. 3. c. 6, § 24.

[b] 2 Woodeson, 442. Sir L. Jenkyns, 754.

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ed on the ground of invasion of neutral territory, should be maintained by a belligerent party. It is even allowed that it would be most conformable to the true point of the case if the suit was in the name of the United States. What effect this would have I do not determine.

As to the case of Palachi, reported by Bulstrode,[a] I leave it to be judged of from an inspection of it, and the principles I have before mentioned as prevailing among the civilians in England at that day. My lord Coke's statement of it in his 4 Institute does not confine it to criminal proceedings under British statutes.[b] He says that if the Spaniards sue for the property taken *civiliter* in the admiralty, a prohibition should be granted. And yet in Bulstrode it appears that the prohibition was refused. The civilians and common lawyers of that day, held some opinions not accounted sound at this time. My lord Coke might have thought that the British laws and statutes alone should be attended to; and that the admiralty had no jurisdiction because the goods were on land, *infra corpus comitatus;* and the civilians thought otherwise, because the capture was not carried into the enemy's territory. But both these opinions are now exploded: for the admiralty has cognizance of matters on land if they are incidents to those at sea; and the doctrine of the civilians, as before supposed, is confessed not to be the law of this day. Modern improvements in jurisprudence have abolished many ancient opinions, and we must act upon the law as it now is. This case of Palachi has been insisted on by

Admiralty has cognizance of matters on land as incidents.

[a] 2 Bulstrode, 28.

[b] 4 Inst. 154.

both sides, as favourable to their opposite opinions. This, it must be allowed, does not shew its precision and certainty. It is to be presumed (because it is mentioned by lord Coke in delivering the opinion of the court, or stating the case as Bulstrode has reported it) that Palachi, or Pelagus, being a Jew, and having drowned some Spanish prisoners, had some influence on this case. The Spanish ambassador was a formidable antagonist to the ambassador from Morocco. Gondemar governed king James, and royal influence was not unknown in the courts of justice. Political motives had their weight, and it was not as well settled then as it now is, that the Moors were to be treated on a footing with other nations.[a]

I do not think the worse of cases in general for their antiquity. But I do not follow them unless I am satisfied with the principles on which they stand. All the cases produced by the libellants, that I recollect, are a century old, and in this period it is singular that none can be produced expressly to their point. Those in sir Leoline Jenkins do not shew any restitution by sentence of the court of admiralty. There appears to have been many proceedings in that court. One of them in Ireland evidently wrong; and another in which a prize was dismissed for trial in the proper jurisdiction,[b]—probably the court of the captor. But, by breaking bulk, she came under the notice of the court again, possibly for a breach of fiscal arrangements. In general, all that is to be found in sir Leoline Jen-

[a] See Woodeson, 2 vol. 425

[b] Life of Sir L. Jenkyns, 733. 727.

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kins, shews references from the king to him, and reports to the crown in consequence, to aid diplomatic enquiries. This seems to favour, rather than oppose, the opinions of the advocates for the captors in this case. There are a great variety of sentiments and opinions in these extra judicial reports of sir L. Jenkins, of which I highly approve.[a] But I am not convinced that this court is the proper place to carry them into effect. If the court over which sir Leoline presided could, in his opinion, have effected the objects of his correspondence with the king, we should have seen decrees and not letters on the subject from him to the crown. His opinion in page 751, is against the doctrine of carrying prizes *infra præsidia.*

As to the opinions in the "Expositions de Motifs," it is easy to say, as it is said by one of the advocates for the libellants, that they do not apply. It is as little difficult to say that they do. The cases on which the dispute originated, it is very true, are different from this. They were those of captures on the high seas, and the neutral ships brought into the ports of the captors, having the property of enemies on board. The commissioners appointed by the king of Prussia, composed a kind of court of review. But the principles laid down will apply to captures by one enemy from another. This may be seen by a reference to the books in which the exposition is to be found.

I do not extend these opinions farther, than to captures by one enemy from another. The treaty with France[b] insisted on by the captors, extends no

[a] Life of Sir L. Jenkins on this subject, passim.

[b] Treaty of Alliance with France, § 17.

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farther than to such captures. This treaty has its due weight with me; but only in cases evidently comprehended in it. And it appears to me that this case is one of them, so far as judiciary, but not diplomatic examinations are concerned.

The judiciary the expositors of the law, and do not share the sovereignty of the country.

The idea that part of the sovereignty of this country is given to the judiciary, is to me new. It should be well weighed before it is agreed to. I have not the same opinion in this point. I consider the judiciary as the expositors of the laws, and not partakers in the sovereignty. Their power is confined to matters of internal police; externally they have no power: they have none of the powers of peace or war. They have no right to command the forces of the country; and these are the means after negociation fails, by which sovereigns decide their disputes. The courts of England, though they decide freely on all matters of internal police, will not meddle with these rights of the sovereign.[a] They will not even grant a habeas corpus in the case of a prisoner of war, because the decision on this question is in another place, being part of the rights of sovereignty. Although our judiciary is somewhat differently arranged, I see not, in this respect, that they should not be equally cautious.

The position, that in a neutral territory there is no war, and therefore there can be no legal captures is a good argument if used in the proper place. The reason is, that "he who acts against his enemy in the territory of a friend, acts also against the state who governs there."[b] It is an offence to the neutral state. But still the question recurs—Which is the

[a] 2 Burr, 765. 766.

[b] Lee, 122. 123.

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proper department of the neutral state to inquire into and vindicate this offence? The weight of this argument, though it bears upon the point of outrage to the neutral, does not relieve us from the difficulties attending it. If this court would assume jurisdiction, and could ascertain our territorial limits and restore the property, the outrage would still remain for the nation to vindicate, if it should think proper. Therefore the court could afford but a partial remedy: and it is best to be settled where the whole can be accomplished.

Question relative to a supposed trespass cannot be enquired into.

The allegation that the libellants are not calling forth the powers of a prize court, but are seeking redress for a marine trespass, does not comport with the terms of the libel. But it is impossible to enquire into the question of trespass, without involving that of prize or no prize, and so "the original cause must all come over again."[a] The procedure here is *in rem.* and the object a specific restitution.

Damages may be superadded, but a proceeding for a marine trespass is different, as it is entirely a suit for damages, and not for the thing itself.

This case not included in the judiciary act.

Neither does this suit for a specific return of the property, appear to be included in the words of the judiciary act of the United States, giving cognizance to this court of "all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States."[b] It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.

[a] Douglass, 612.

[b] Judiciary Act, § 7.

PRIZE.

A variety of observations were made by the advocates for the libellants, on the general principles of government, the rights of sovereignty and neutrality, and the consequences flowing from an invasion of those rights, just in themselves, but not, in my opinion, necessary for me to determine upon. They will fall very properly under the notice of our government, when the subject is before them. I should very willingly relieve them from part of the burthens thrown upon them by the unhappy contests among other nations; but my views of the powers of this court forbid my interference.

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I do therefore decree, order and adjudge, that the brigantine Fanny, her tackle, apparel, and furniture, and the goods, wares and merchandize, mentioned in the libel, be discharged from arrest, and the libel be dismissed, the plea to the jurisdiction being relevant.

Discharge of the Fanny from arrest ordered.

ILLEGAL CAPTURE.

Hollingsworth & Co.
versus
The brigantine Betsey.

LIBEL.

To the honourable Richard Peters, esq. judge of the district court of Pennsylvania.

1793.

The Betsey, belonging to the libellants, citizens of the United States, bound from St. Bartholomews to Amsterdam, with a neutral cargo on board, was taken by a French privateer, and brought into the port of Philadelphia. The district court ordered her to be restored and awarded damages to the libellants and the owners of the cargo.

JEHU HOLLINGSWORTH, the younger, and John Shallcross, of the city of Philadelphia, merchants, by their bill and libel, in all humble manner shew, that they the said Jehu and John are citizens of the United States of America, and real and true owners of a brigantine called the Betsey, commanded by William Clark, and in due form of law registered by the government of the United States.

That the said brigantine being at the island of St. Bartholomews, in the West Indies, belonging to the king of Sweden, he the said William Clark did, on or about the seventh day of May last, enter into a charter-party with P. H. and Abraham Runnals, burgers of the said island of St. Bartholomews and subjects of the king of Sweden, and by the said charter-party the said William Clark did grant and to freight let unto the said P. H. and Abraham Runnals, the whole tonnage of the hold of the said brigantine, deck, half-deck and cabin, from the port of Gustavia in the said island, on a voyage to be

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made by the said Clark, with the said brig with the goods and merchandizes of the said P. H. and A. Runnals, to either of the ports of Amsterdam or Hamburgh, as should be assigned or concluded upon by the consignee, A. Runnals, on their entrance in the British channel; and if need was, to put into any one of the safe ports, harbours or bays on the coast of Great Britain, the danger of the seas excepted.

That the said P. H. and A. Runnals did cause the said brigantine to be loaded with a cargo of sugar, coffee and other articles, the property of the said P. H. and A. Runnals, and the said William Clark did on the twenty-eighth day of May last, sail from the said island of St. Bartholomews, and proceeded on the voyage in the said charter-party mentioned, but on or about the fifteenth of June last, the said brigantine Betsey being in the prosecution of the said voyage, was forcibly, violently, tortiously and unlawfully, in the latitude of 36 deg. north, and longitude 45 deg. west from London, on the high seas and within the jurisdiction of this court, attacked and taken by a certain armed vessel of Marseilles, called the Sans Culottes, commanded by a certain Joseph Moulinary, and by the said Joseph Moulinary and the crew of the said Sans Culottes, was forcibly and against the will of the said William Clark and to the great damage of the said Hollingsworth and Shallcross, from the defeating the said voyage and rendering them unable to comply with the said charter-party, tortiously, violently and unlawfully brought into the port of Philadelphia on the third day of July last, where the said brigantine Betsey and the cargo so laden on

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board her as aforesaid, have been ever since and still are detained by the said Joseph Moulinary from the said Hollingsworth and Shallcross and the said William Clark, although repeatedly demanded.

To the end that the said brigantine Betsey, with her cargo, tackle, apparel and furniture may be restored to the said Hollingsworth and Shallcross—that they may be compensated for all damages, and that justice may be done in the premises as to your honour shall seem meet, may it please your honour to cause process to be issued for the seizing the said brigantine Betsey with her cargo, tackle, apparel and furniture—for the seizing the said vessel called the Sans Culotte, and the apprehension of the said Joseph Moulinary, so that he be and appear at the next court to answer to your libellants.

WM. LEWIS, *for the libellants.*

PLEA.

The plea of Joseph Moulinary, a citizen of the French republic, on behalf of himself and all concerned in the capture of the brigantine called the Betsey and her cargo, to the libel and petition exhibited to this honourable court by Jehu Hollingsworth and John Shallcross, the said Joseph Moulinary by protestation not confessing or acknowledging any of the matters and things in the libellants' said petition and libel contained, to be true, in such manner and form as the same are therein and thereby alleged for plea to the said libel and petition, says, that he was at the time of his attacking in an hostile manner and making prize of the said brigan-

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tine, her cargo and people, and now is duly commissioned by the French republic as captain on board the armed vessel Sans Culottes, fitted out by and belonging to the citizens of the said republic, to attack all the enemies of the said republic, wherever he might find them, and take them prisoners with their ships and property, which commission he is ready to shew unto your honour—that he the said Moulinary, with his officers, seamen and mariners on board the said armed vessel Sans Culottes, took as prize the said brigantine Betsey, belonging to some subject or subjects of the United Netherlands, then in open hostility and actual war with the French republic and her citizens, and brought the said brigantine and property, as prize, into the port of Philadelphia—he therefore prays that he may be hence dismissed, and the said brigantine Betsey and cargo, and the said armed vessel called the Sans Culottes discharged from arrest.

JOSEPH MOULINARY.

P. S. DU PONCEAU,
Advocate for the respondents.

REPLICATION.

The replication of Jehu Hollingsworth, and John Shallcross, to the plea of Joseph Moulinary—

These repliants asserting that all the matters and things in the petition and libel of the said repliants are true, do reply and aver, that the matters and things in the said plea by the said Joseph Moulinary pleaded, are not true; and particularly that the said brigantine Betsey did not at any time whatever

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belong to any subject or subjects of the United Netherlands, or of any other foreign power, state or kingdom, all which they are ready to maintain and prove when, &c.

JEHU HOLLINGSWORTH, jun.
JOHN SHALLCROSS.

WM. LEWIS, *for libellants.*

INTERLOCUTORY DECREE.

Being satisfied by the papers produced to the court, that it appears, *prima facie*, that the brig Betsey is American property, and the cargo the property of subjects of the king of Sweden; and that the capture, so far as those papers evidence, is not a taking by one enemy from another; and the ship and goods being expensive and perishable, I pronounce the following interlocutory sentence and decree.

It is, however, to be understood, that I do not hereby preclude further investigation and inquiry into any matter or thing, herein taken, *quoad hoc*, for granted; but the whole subject, as to fact, law and jurisdiction, is open for discussion, and for the final sentence and decree of the court.

Restoration of the vessel and cargo ordered.

It is ordered and decreed by the court, that the brigantine Betsey in the libel mentioned, her tackle, apparel and furniture, and the goods, wares, and merchandize wherewith she was loaded at the time of her capture, be delivered to the libellants in this cause, on their entering into stipulation to abide the final order and decree of this, or the court of appeals in this cause, and to make restitution of the vessel

and cargo, or the value thereof, in case the libel be finally dismissed. Hollingsworth et al. vs. the Betsey.

And now, to wit, this thirteenth day of June, one thousand seven hundred and ninety-four, the libellants exhibit a notice from the respondents to shew to the court certain books, papers, letters and documents therein mentioned, which notice is filed, among the exhibits in this cause; and the libellants produce and shew to the court the books, letters, papers and documents so required: Whereupon, the counsel for the respondents waive all further controversy respecting the property of the said brig, and the cargo on board her at the time of her capture. It is also agreed that the cargo is protected from capture by the treaty between the United States and the French nation: Whereupon, and on consideration of the evidence produced in this cause, I do finally adjudge, order and decree, that the said brigantine Betsey, her tackle, apparel and furniture in the libel mentioned, and the goods, wares and merchandize on board her at the time of her capture, be restored to the libellants with costs agreeably to the prayer of the libel. But at the request of the counsel for the respondents, the point of damages is reserved for argument, and the further and final decree of this court; and the respondents have leave to answer further on that point. Question of damages reserved.

RICHARD PETERS.

ANSWER TO THE CLAIM OF DAMAGES.

And now, *viz.* June 17th, 1794, the respondents in this cause, for further answer to so much 1794.

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of the libel of the said Jehu Hollingsworth and John Shallcross, as prays for damages to be allowed and assessed to them, against the said respondent for the seizure, detention, and bringing in as prizes of the said brig Betsey and her cargo, under protestation that this honourable court is not competent to give damages in a case of this nature, justify the taking and bringing in as prize of the said brig Betsey and her cargo, by alleging, that it is lawful by the laws of war, for an armed vessel of a belligerent nation duly commissioned, to seize and take upon the high seas, and bring into port for legal adjudication a vessel sailing under a neutral flag, on suspicion that such vessel does not *bona fide* belong to neutral subjects or citizens, but that she is the masked property of the enemies of the country to which the armed vessel belongs. That at the time of making the said capture, the respondents had probable ground to suspect that the said brig Betsey was the masked property of the enemies of the French republic, and brought her into the port of Philadelphia for legal adjudication. On this ground, protesting as aforesaid, they pray that the libel of the said Hollingsworth and Shallcross, in as much as it respects damages, be hence dismissed with costs.

P. S. Du Ponceau,

Advocate for respondents.

REPLICATION.

The replication of the libellants to the plea of the respondents, dated 17th June, 1794.

The libellants expressly denying that at the time

of making the capture in the libel and plea mentioned, the respondents had probable ground to suspect that the said brig Betsey was the masked property of the enemies of the French republic, and saving to themselves all benefit of exception to the said plea, reply and say that nothing in the said plea contained ought to preclude them, the said libellants, from the recovery of damages against the said respondents agreeably to the prayer of their libel.

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WM. LEWIS, *for libellant.*

DECREE.

The brigantine Betsey, the property of the libellants, who are citizens of the United States, was, in pursuance of their orders, let on freight by the captain of the said brigantine, about the seventh of May, 1793, at the island of St. Bartholomews, to P. H. and A. Runnals, subjects of the king of Sweden and burghers of that island. The vessel being at St. Eustatius when chartered, a few hogsheads of sugar were purchased there and taken on board, as part of her cargo, agreeably to the charter-party, and the said brig sailed therewith from St. Eustatius to St. Bartholomews, where she completed her cargo, consisting of sugar, coffee and a few hides, which belonged to the freighters, P. H. and A. Runnals. The brig having thus completed her cargo, set sail from St. Bartholomews bound to Hamburg, agreeably to charter-party, on the 28th of the same month of May; on the 15th of the following June the vessel and cargo, when proceeding on her voyage aforesaid, were captured by the

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French privateer Sans Culottes of Marseilles, and on the 22d of July in the same year, brought into the port of Philadelphia. This privateer was under Spanish colours, and is a xebeck, whose fashion and appearance were peculiarly alarming. The circumstances happening at the time of capture will appear in the exhibits filed in this cause.

On the 13th of June, 1794, after a minute investigation and severe scrutiny, in which even the books and private correspondence of the libellants had been repeatedly submitted to the council and other persons on the part of the respondents, the said council abandoned all further controversy respecting the property of the brigantine, and agreed that the cargo was protected from capture by the treaty between the United States and France.—Whereupon and on consideration of the evidence produced, a decree for restitution was passed, but the point of damages was reserved.

On the hearing of this point, it was contended by the advocates for the respondents, that the circumstances occuring at the time of capture justified the bringing into port, and amounted to such probable cause as will, agreeably to the general laws of nations and the ordinances and regulations of France particularly, repel any claim to damages for the capture and detention.

I have maturely weighed the evidence on which the arguments of the advocates for the respondents were founded, and taken into consideration the authorities by them produced, I am nevertheless of opinion, that although the circumstances appearing to the captors at the time of capture might probably excuse an examination on the spot, yet they did

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not amount to a justification of their conduct in compelling the vessel to deviate from her lawful voyage in a manner so ruinously injurious to the owners of both vessel and cargo. Whatever may be the opinions of individual nations, having arms in their hands and of course the power to enforce such opinions, it is at least questionable whether neutrals are bound to submit to searches, however prudent it may be that they should, sometimes, yield in this particular. There are very respectable authorities which assert, that "a neutral ship is not obliged to stop to be searched;" although there are others, holding the contrary doctrine.*

* It seems to be a settled principle now, that neutrals are bound to submit to searches, and the modes of conducting such searches are the only subjects of dispute.

Our nation has acknowledged this right by entering into arrangements in several treaties and conventions, as to the manner of effecting it. In the above case, testimony was taken (and had due attention paid to it) to shew that there was ground for apprehension on the part of the American master and crew, that the privateer was a cruizer belonging to one of the Barbary powers. The privateer was a xebec, and the colours under which she first appeared were false and suspicious. The fashion and appearance of the vessel created alarm in the minds of the captain, supercargo and crew, and induced some preparation for flight or concealment and destruction of papers, which however were not executed. Minute investigation was made as to the property which was suspected to belong to Dutch merchants, France and Holland being then at war; and the books and clerks of the owners were submitted for examination. The right of search and subjects connected with it are discussed in 2 Azuni, part ii, chap. 3, and notes, as well as in other writers.

This and some other cases determined here, shew that I have always considered it justifiable to examine into the claims

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No one nation has, however, the right to dictate in this or any other particular to the rest, by its own ordinances, what shall be law of nations, the principles whereof must be founded in justice and estatablished by common usage and consent. If a belligerent party captures and detains neutral property, he does it *at his peril.* Should the capture and detention, on investigation turn out to be unwarranted by the general law of nations, or forbid by particular treaty, he is bound by every rule of law and reason to make ample compensation. It appears clear that the capture of the Betsey and cargo was in every view of it unlawful, and being of opinion, that the circumstances relied on for pro-

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of our own citizens, and to restore property indubitably neutral, when within our jurisdiction. In the cases of the ship William, and the brig Fanny, I would not take cognizance of captures made by one enemy from another, under my ideas of the impropriety of the examination by judicial authority; afterwards I yielded to legislative injunctions and decisions upon this point. Modern authorities support the principle recognized by the act of congress, giving jurisdiction to the courts in cases of captures within our territorial limits; but no neutral sovereign or state has the right to examine into questions concerning prizes under other circumstances, though brought within its ports or jurisdictional limits, when such questions affect only belligerent nations.

"The prerogative which exempts a ship of war or privateer from the jurisdiction of the sovereign into whose port the prize is carried, ought to have effect only in the case where the prize may belong to an enemy, or the subject of an enemy, and not when the sovereign of the port into which it is carried, or some other neutral power, is invested in the prize; or where it belongs wholly to a neutral, which is a different case."—2 Azuni, M. L. of Europe.

bable cause, do not justify the detention and bringing into port—

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I do decree, adjudge and order, that the respondents pay to the libellants the damages sustained by them by the unlawful capture and detention of the said brigantine Betsey and her cargo, with costs. And to the end that the said damages may be truly and justly ascertained, I do hereby order and direct the clerk of this court to associate with him three intelligent and disinterested merchants of this district, who, or any two of them with the clerk, shall examine into all circumstances relative to the vessel and cargo and the losses and damages consequent thereon, and ascertain the amount thereof, according to justice and good conscience and the clerk is hereby directed to make report of the doings herein at the next court day.

Damages allowed.

Damages to be ascertained by the clerk, &c.

RICHARD PETERS.

REPORT OF THE CLERK ESTIMATING THE DAMAGES.

Conformable to a decree pronounced by Richard Peters, esq. judge of the said court, in the above cause, on the eighteenth day of March last past, the clerk reports:—That having associated with him James Yard, Robert Ralston, and Daniel Smith, of the city of Philadelphia, merchants, the said clerk and his associates have examined into all circumstances relative to the capture of the said brigantine Betsey and her cargo, and the losses and damages consequent thereon, and are of opinion, that accord-

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ing to justice and good conscience, the said libellants Jehu Hollingsworth the younger, and John Shallcross, owners of the said brigantine, by reason of the capture and detention thereof, have sustained damage to the amount of four thousand two hundred and seventy-seven dollars and forty-nine cents, and that P. H. Runnells, and A. Runnells the owners of the cargo, and charterers of the said brigantine, by reason of the capture and detention aforesaid, have sustained damages to the amount of two thousand four hundred and eighty-five dollars, and twenty-nine cents.

JAMES YARD.
ROBERT RALSTON.
DANIEL SMITH.

SAMUEL CALDWELL,
Clerk of the District Court.

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FINAL DECREE.

And now, to wit, this seventh day of April, in the nineteenth year of the independence of the United States, the clerk having agreeably to a former decree, reported—

"That having associated with him James Yard, Robert Ralston, and Daniel Smith, of the city of Philadelphia, merchants, the said clerk and his associates having examined into all circumstances relative to the capture of the said brigantine Betsey and her cargo, and the losses and damages consequent thereon, and are of opinion, that according to justice and good conscience, the said libellants Jehu Hollingsworth the younger, and John Shallcross, owners of the said brigantine, by reason of the capture and detention thereof, have sustained damage to the amount of four thousand two hundred and seventy-seven dollars and forty-nine cents: and that P. H. Runnells, and A. Runnells, the owners of the cargo, and charterers of the said brigantine, by reason of the capture and detention aforesaid, have sustained damages to the amount of two thousand four hundred and eighty-five dollars, and twenty-nine cents."

And the said report being read, and duly considered by the court—

Amount of damages allowed.

It is adjudged, ordered and decreed, that the respondent Joseph Moulinary, pay the libellants Jehu Hollingsworth the younger, and John Shallcross, the sum of four thousand two hundred and seventy-seven dollars and forty-nine cents, for their damages by them sustained by reason of the capture and detention of the said brigantine Betsey. And

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that the said respondent also pay to the said libellants, attornies in fact to P. H. and A. Runnells, the further sum of two thousand four hundred and eighty-five dollars and twenty-nine cents, for their damages by them sustained by reason of the capture and detention aforesaid.

Ordered—That this decree be absolute, unless cause is shewn in four days.

RICHARD PETERS.

NEUTRAL PROPERTY ILLEGALLY CONDEMNED—RESTORED.

John Jolly et al.
versus
The brigantine Neptune,
Paul Coulon, claimant.

LIBEL.

1804.

The brigantine Neptune, belonging to the libellants, was captured by a French privateer and condemned by a court held on board a French vessel at sea, and having been purchased by the respondent, was brought into the port of Philadelphia. The district court ordered her to be restored to her former owners.

To the honourable Richard Peters, esquire, judge of the district court of the United States, in and for the Pennsylvania district.

The libel of John Jolly and Richard Keys, of the city of Baltimore, in the state of Maryland, merchants, and William Manson, of the same place, mariner,

RESPECTFULLY SHEWETH,

THAT your libellants are citizens of the United States of America, resident in Baltimore, in the state of Maryland, and are joint-owners of the brig Neptune of Baltimore, a duly registered vessel of the United States, as will more fully appear by an authentic copy of the certificate of her registry, hereunto annexed, bearing date the seventh day of July, in the year of our Lord one thousand eight hundred and two.

That the said brig, owned as aforesaid, and commanded by the said William Manson, sailed from the port of Baltimore on or about the thirteenth day of September last past, with a cargo on board belonging to your libellants, on a voyage to Surinam, from thence to the West Indies and back; that while she was peaceably and lawfully pursuing

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her said voyage on the high sea, the said brig and her cargo on or about the ninth day of December last past, were tortiously, forcibly and piratically seized, taken possession of and detained, by a French privateer called "The Serpent," Henry Anderson, commander, and the said brig sent into St. Jago de Cuba, where, as your libellants have been informed and believe, the cargo was sold or disposed of. That since the seizure as aforesaid, the said brig has been brought into the port of Philadelphia in the district of Pennsylvania, and within the jurisdiction of this honourable court, where she now lies, by a certain Paul Coulon, and other persons, to your libellants unknown.

That your libellants, thereupon, pray the aid of the process of this honourable court to arrest and attach the said brig, and that the same be decreed to be restored to them, together with such damages to be paid by the said Paul Coulon and others, for the said seizure, detention and spoliation of the said brig and cargo, as to this honourable court shall seem just and proper.

JOHN HOLLOWELL,
for the libellants.

CLAIM.

In the matter of the suit civil and maritime in the district court of the United States, for the district of Pennsylvania, by John Jolly and Richard Keys, of the city of Baltimore, in the state of Maryland, merchants, and William Manson, of the same place, mariner, against the brig Neptune, her tackle, apparel and furniture,

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The claim of Paul Coulon, in all humble manner, SHEWETH,

That on the sixth day of November, in the year of our Lord one thousand eight hundred and three, and for a long time before and continually since, the island of St. Domingo in the West Indies, belonged to and was lawfully a colony of the French republic, and was subject to its laws, regulations and ordinances, and that at the same time, and long before and continually since, there existed a rebellion in the said island against the said French republic, and certain revolted negroes in the said island openly opposed by force of arms the jurisdiction and authority of the said republic over the said island, and that in order to suppress the said insurrection and rebellion, certain laws, ordinances and regulations had been duly made and promulgated by the said republic or her agents thereunto lawfully authorized, whereby all manner of intercourse, trade and dealing was prohibited to persons foreigners to the said French republic, with any other part of the said island but the two ports of Cape François and Port Republican, and all foreign vessels entering or attempting to enter any other port of the said island than the said two ports before mentioned, for any purpose of intercourse with the said revolted negroes, was declared to be liable to confiscation.

And your claimant further sheweth, that on or about the said sixth day of November in the same year, the said brig was employed by a certain William Manson the master or commander of her, in carrying on prohibited trade and intercourse with

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the said revolted negroes in the said island, and for that purpose did enter or attempt to enter the port of Jacmel in the said island (being a port in the said island other than the said ports of Cape François and Port Republican), and was then sailing on the high seas, bound to Les Cayes, another prohibited port in the said island, and was in the prosecution of such her unlawful voyage, when she was arrested and captured by a certain armed cruiser, called Le Serpent, commanded by a certain Henry Anderson, who was duly authorized and commissioned by the French republic for that purpose, and by the said Henry Anderson impleaded and prosecuted for such unlawful trade, and duly condemned and adjudged to be forfeited therefore, by a competent tribunal, acting under the authority of the said French republic, and by the same authority duly sold to the said Paul Coulon, for a full and valuable consideration.

And the said Paul begs leave to state that by reason of the premises he became, and ever since the ninth day of February, in the year one thousand eight hundred and four hath been, and yet is, the lawful owner of the said brig, her tackle, apparel and furniture, and has laid out considerable sums of money in equipping and ameliorating the said brig—

Wherefore he prays, that the said libel of the said John Jolly, Richard Keys and William Manson, may be dismissed, and that the said brig may be restored to him with his costs and charges and all damages in this behalf most wrongfully sustained.

P. Coulon.

Levy, *advocate for the claimant.*

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The above P. Coulon being solemnly sworn, doth depose and say, that what is contained in this his answer, as far as concerns his own act and deed, is true of his own knowledge, and that what relates to the act and deed of any other person or persons he believes to be true.

P. COULON.

REPLICATION.

The reply of John Jolly, Richard Keys and William Manson, libellants, to the claim of Paul Coulon, exhibited and filed in this cause.

These replicants saving and reserving to themselves all and all manner of exceptions to the manifest uncertainties, imperfections and insufficiencies in the said claim contained, for reply thereto, aver, propound and say, that the said brig Neptune was employed by her said owners, the libellants, in a voyage from the port of Baltimore, in the state of Maryland, to Surinam, thence to the West Indies, and back to the said port, as in their said libel is set forth. But they deny that the said brig was so employed in carrying on any unlawful trade and intercourse, to or at the island of St. Domingo, or to or at any port or place in the said island, or that she was in the prosecution of an unlawful voyage, when she was arrested and captured by the French privateer, called, "The Serpent," as in and by the claim of the said Paul Coulon is most untruly stated and alleged.

And these repliants further propound, aver, and say, that they have heard and believe, that an insurrection, or revolt had taken place among certain

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negroes in the said island of St. Domingo, the same being then a colony of the French republic, though they do not know at what time such insurrection or revolt commenced, how long it has lasted, or to what parts of the said island it extended. But these repliants deny, that either at the time of the sailing of the said brig from the said port of Baltimore as aforesaid, or at the time of the said arrest and capture of the said brig by the said French privateer on the high seas as aforesaid, or at any time before, or since, to their knowledge, any laws, ordinances or regulations had, or have been duly made and promulgated by the said French republic, or her agents thereunto lawfully authorized, whereby all manner of intercourse, trade and dealing was prohibited to persons, foreigners to the said French republic, with any other port of the said island but the two ports of cape François, and Port Republican: and whereby all foreign vessels entering or attempting to enter, any other port of the said island, than the said two ports, for any purpose of intercourse with the said revolted negroes, was declared to be liable to confiscation.

And these repliants further propound, aver and say, that although true it is that the said brig Neptune did, in the course of her said lawful voyage, enter the port of Jacmel in the said island of St. Domingo, to wit on or about the day of in the year 1803, yet she did not enter the same for any purpose of intercourse or prohibited trade with the said revolted negroes; nor was she bound to Les Cayes (another prohibited port of the said island as in the said claim is alleged, but which is not here-

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by admitted,) when she was arrested and captured by the said French privateer as aforesaid.

And these repliants further propound, aver and say, that if any such laws, ordinances and regulations were made as in the said claim of the said Paul Coulon is stated and alleged (but which these repliants do by no means confess or admit) the same were not duly notified, and were altogether unknown to them, and more particularly to the said William Manson, commander of the said brig, as well at the time of her sailing from the said port of Baltimore on her voyage aforesaid, as at the times respectively of her entering the said port of Jacmel as aforesaid, and of her being arrested and captured by the said French privater as aforesaid.

And these repliants further propound, aver and say, that the said French privateer called "The Serpent," commanded by the said Henry Anderson, was not duly authorized and commissioned by the said French republic, to arrest and capture the said brig Neptune as aforesaid: and that the said Henry Anderson did not in due form of law, and according to the convention subsisting between the United States of America and the said French republic, prosecute the said brig Neptune; and that the same was not duly condemned and adjudged to be forfeited by a competent tribunal, according to the law of nations and the said convention. Nor was the said brig by such competent authority duly sold to the said Paul Coulon for a full and valuable consiration; nor did the said Paul Coulon on the ninth day of February, in the year 1804, or at any other time before or since, become the lawful owner of the said brig, her tackle, apparel and furniture; nor

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has he laid out considerable sums of money in equipping and ameliorating the same. But these repliants aver, that the said brig and her cargo were falsely, forcibly and piratically seized, taken possession of, retained and disposed of, by the said French privateer, as in and by their said libel is stated and alleged; and thereupon they pray that the said claim of the said Paul Coulon may be dismissed with costs, and that the said brig be decreed to be restored to them, together with such damages to be paid by the said Paul Coulon for the said seizure, detention and spoilation of the said brig and cargo, as to this honourable court shall seem just and proper.

JOHN HOLLOWELL,
for the respondents.

DECREE.

The statement of this case may be collected, in detail, from the proceedings. The brig in question and her cargo were said to have been captured by the privateer Serpent, commanded by a certain Henry Anderson, averred to have been commissioned by the French republic on a voyage, as it is alleged then performing by the brig Neptune, from a port of St. Domingo, to another port of that island, both interdicted by the military commander in that island; all intercourse being prohibited with any other than two ports, *viz.* Cape François and Port Republican. The port (Jacmel) at which the brig had been, or that to which she was said to be destined (Le Cayes) were not licensed, but prohibited ports, in possession of the blacks, who are stated to

be forbidden by certain ordinances of the authorized agents of the French republic in St. Domingo, as well to neutrals as to French vessels.

The facts stated in the libel and other proceedings by the libellants are shortly these—the brig Neptune an American registered vessel, and her cargo, belonged to the libellants, residents in Baltimore and citizens of the United States; and was employed in lawful commerce, on a voyage from Baltimore to Surinam, thence to the West Indies and back to the port of Baltimore. They deny that she was in the prosecution of any unlawful trade or intercourse, to or at the island of St. Domingo, or to or at any port in that island. They deny also that they knew of any laws, ordinances or regulations made or promulgated by the French republic prohibiting intercourse with any other than the two ports before mentioned: and although she had touched at Jacmel, with no intention to carry on any prohibited trade or intercourse, yet she was not bound to Le Cayes when she was arrested and captured by the Serpent. They deny that the privateer was duly commissioned, aver that the brig, being tortiously captured, was not prosecuted and impleaded according to the convention subsisting between the United States and the French republic. That the said brig was not condemned by a competent tribunal, or sold to the claimant, Paul Coulon, for a full and valuable consideration, by lawful and competent authority, &c.

That the vessel was a registered vessel of the United States, and belonged to the libellants at the time of her sailing from Baltimore and capture, are in proof and not denied. The pretended condemnation of this vessel is attempted to be proved, by alleged

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copies of the proceedings of a tribunal sitting on board a French vessel at sea, on board whereof were the military commander of part of the island of St. Domingo, together with two others, who stile themselves officers of the court of prizes established under the French republic, at the Mole, in the island of St. Domingo. By this alleged tribunal, in which M. de Noailles, a French general presided, a proceeding was had, in the absence of the captured vessel, which had been sent for a port in the island of Cuba. This proceeding began at seven o'clock in the morning of the day on which it was finished: the commencement and conclusion of the cause occupied but a few hours, under the idea of the necessity of urgency, as therein stated. It appears on the face of the copies of these proceedings, that they were had at sea, and far beyond any jurisdictional limits claimed by any country. The French part of the island of St. Domingo had been abandoned by the officers civil and military of the French republic. Those who were then on board of the vessel carrying these officers, who held the supposed court, were driven from the place wherein their authority had been exercised, and were then flying from the blacks, who had gained possession of the scene of their former alleged jurisdiction.

There is no other proof of any facts alleged by the claimant than that contained in the exhibits purporting to be copies of these proceedings. And whether this alleged court and its proceedings are lawful, and such as I am bound to respect, is the main question in this cause.

I have no hesitation in declaring that in my opinion, that pretended court was unlawful. It was not warranted by the usage and laws of nations, or the convention between the United States and France. It would be an unnecessary waste of time to shew by any reasoning or authorities, that that court was illegitimate.* The officers then composing it—the place where it was held, and the circumstances attending the whole transaction—the haste and informality, and (it being an unauthorized tribunal) I may add the injustice of its proceedings, afford ample data to justify me in rejecting all proofs, or legal effects, claimed under its allegations or decrees: sufficient evidence to warrant every objection, appears on the face of its proceedings.—There is no proof therefore, before me, that the property of the vessel in the libel mentioned has been lawfully divested from her American owners. I do therefore adjudge, order and decree, that the said brigantine Neptune with her tackle, apparel and furniture be restored to the libellants with costs and charges.

* See the note, page 27, and the authorities there referred to.

SALVAGE.

Paul Coulon
versus
the brig Neptune, &c. John Jolly, Richard Keys, and William Manson, respondents.

DECREE.

1804.

The brig Neptune had been purchased by the libellant after a condemnation by an unauthorized tribunal; and having been brought into Philadelphia, she was here claimed by the former owners, and was restored to them by the district court. A claim for salvage was made by the purchaser after the condemnation, he having brought her within the power of her former owners. The district court dismissed the claim.

THE brig Neptune, being American property, belonging to the respondents, citizens of the United States, and resident in Baltimore, was seized by a French armed vessel, commanded by a certain Henry Anderson, under pretext of having violated an *arrette* issued by the late general Le Clerc, when commander in chief and governor of St. Domingo, interdicting trade and commerce with certain ports in the French part of that island, to prevent supplies to the revolted blacks. On her being so seized, at sea, several leagues from the island, and out of all territorial jurisdiction and limits, she was sent to St. Jago de Cuba, in the island of Cuba, belonging to and under the actual government of Spain. The vessel having been so dispatched for St. Jago, a pretended court of admiralty was held, at sea, on board the capturing cruizer, by general de Noailles, then in the service of France, and some officers of a tribunal which had been established in St. Domingo. The brig, by this self-created court was condemned. The persons composing this pretended court were then in a state of flight from the island of St. Domingo, then in full possession of the blacks, who had expelled the French soldiers and citizens, and

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extinguished all power and government, under France, in that island.

The libellant, stating himself to be an American citizen, purchased the brig in St. Jago, from an agent of Anderson, the seizer, (from whom he took a warranty) with intent to employ her in commerce, or as a passenger ship, for his emolument. Considerable outfits were made on the vessel for these purposes by Coulon. Some passengers embarked in the vessel, and arrived in Philadelphia, where the brig was restored, by a decree of this court to the American owners, now the respondents. The facts of intercourse with interdicted ports, for purposes of traffic, were denied; and the condemnation was deemed and declared illegal and invalid.

A claim is now brought forward for salvage. No demand for amelioration. The allegations contained in the proceedings were insisted on, as entitling to salvage (no matter from what motive the libellant acted) as a benefit had accrued to the owners by the purchase in St. Jago, and bringing into an American port, in a capacity to be restored.

I can find no precedent in the books to warrant a claim to salvage, by a purchaser of a ship liable to be restored. There are some instances where recaptors, or rescuers, have had salvage, though the vessel was restored to the owners after having been purchased under a bad title.—Such cases seldom occur. A neutral may lawfully purchase, in the port of a belligerent party, a ship legally condemned as prize. But care must be taken on this point, as some national tribunals are more strict than others in scrutinizing the title of a ship procured in this way. The English permit purchases by neutrals

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of ships legally condemned in their enemies' ports. The French do not acknowledge their validity.[a] Salvage is not given as a mere *quantum meruit* for benefit received. It is a premium to stimulate exertion, prowess and personal danger and risk.[b]

The novelty of this claim may create a bias in my mind, which I have in vain endeavoured to resist. The case has always appeared to me to be brought forward more to ground a recovery over, on the guarantee, than under a hope of success here.

It is true that the motives for saving property are generally interested.—But the motives, in this case, are not so important as the principles of the claim.

Before any thing can be *saved* it must be *lost* to the owner, or on the point of so being, without hope of recovery, either specifically or in value. I am inclined to consider the seizure in this case a mere spoliation, for which either the French or Spanish government should have paid the owners of the brig in case of loss. My official respect for those governments will not permit a belief that they *will not* do what they *ought*. The courts of one country must presume that the governments of friendly nations will always do justice. I do not, however, think it incumbent on me to determine collaterally a question involving national duties and obligations, further than the case before me compels an opinion. A neutral government ought not to restore a vessel of its friend brought into port, captured by another friend, as *prize* in war. But it is otherwise, where a ship belonging to a friend is brought in under re-

[a] 1 Rob. Cases Adm. ed. 104. [b] See the case of Warder et. al. *vs.* the Belle Creole, ante page 31.

straint on seizure by another friend, and all parties at peace. A pretext of seizure for breach of local regulations, ought not to take the case out of this rule of the law of nations. Such pretexts would never be wanting, if they would justify sales and transfers of vessels, seized under these pretences.

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If this view of the subject be correct, the brig in question was not legally, or in fact, *lost*, to the American owners, when carried into the Spanish port of St. Jago. The purchase by Paul Coulon (more especially if an American citizen) was not justifiable, much less meritorious. If he bought under a bad title, he must take the risk. He appears to have considered this consequence when he took the guarantee from the vendor in St. Jago. If he is disappointed in his expectations of profit, the owners should not reimburse expenditures for this object. As well might they be called on to repay the purchase-monies paid the captors. Why ask to retribute a part?—I agree with the counsel for the respondents, that if salvage, in our own courts could be obtained, great encouragement would be given to such captures and illegal sales. In this case, what is given to the libellant would be so much saved to the vendor, when called on under his guarantee by Mr. Coulon.

I do not think it necessary to discuss all the points in this cause. How far and in what manner a nation has a right to interdict commerce by other nations with its revolted subjects, or their slaves in a state of insurrection? Whether French *colonial arrettes* die with the extinction of the government promulgating them? And what is the state of things, as they respect us, in the island of St. Domingo?

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These questions seem to be subjects more fit for diplomatic discussion, or legislative direction, than judicial decision. They are unimportant in this case, as the fact of intercourse, for the purposes of traffic, with interdicted ports, is denied.

If Spain was bound to restore the brig in question, or remunerate the owners for their loss; if at any rate no sale such as herein stated could be legally made, and of course the purchase unwarrantable, and defective in that merit which is the foundation for a claim to salvage, it is enough for the purposes of decision in this suit.

The results from this view of the case tend to shew—

1st. That the vessel or value thereof, was not *lost* to the owners by the seizure and carrying to the port of St. Jago.

2d. That the benefit derived to the owners by Mr. Coulon's purchase, is at least problematical, and not a direct consequence of such purchase, or flowing from any meritorious conduct on his part. He has not the equitable claim to considerations attaching to an innocent purchase, by mistake or ignorance of title. The whole circumstances were known to, and guarded against by the libellant.

I do therefore adjudge, order and decree, that the libel filed in this cause be dismissed with costs.

1806.

Phineas Bond, esq. his Britannic majesty's consul-general for the middle and southern states.
versus
The British brig Cora, and her cargo.

The brig Ceres of New York, on her voyage from the Havanna home, fell in with the British brig Cora, deserted by her crew, and with five feet water in her hold. A part of the crew of the Ceres were put on board the Cora, who with much difficulty brought her into Philadelphia. The Ceres was exposed to great danger from the absence of some of her hands. The British consul filed a libel praying that the Cora might be restored on paying salvage. The salvors, owners and crew of the Ceres, filed their libel for salvage; and a Spaniard who had been a passenger on board the Ceres also claimed a proportion of the salvage. There was also a libel for salvage filed by the own—

LIBEL.

To the honourable Richard Peters, judge of the district court of the United States for the district of Pennsylvania.

PHINEAS BOND, esq. his Britannic majesty's consul-general for the middle and southern states of America, with all due respect sheweth, That a certain British brig, of very considerable value, laden, as he is informed, with coffee and sugar and other articles, bound from Jamaica to London, hath been found at sea, deserted from necessity by her crew, and brought by certain persons to him unknown into the port of Philadelphia, and is now riding at anchor at the Lazaretto.

That the said brig is, he believes, named the Cora, but he knoweth not to whom the said brig and cargo belong, but has reason to believe that they are the property of subjects of his Britannic majesty.

On behalf of whom it may concern, he prays, that the said brig and cargo, may by the process of the district court, be taken into the custody of the marshal, and restored to the owner, or owners of the same, after payment of reasonable salvage to those who have brought the same into port, or that

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such other steps may be taken in the premises as to your honour shall seem fit.

P. BOND.

EDW. TILGHMAN, *proctor.*

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of goods on freight on board the Ceres. One third of the gross amount of sales was decreed by the district court to the owners, crew and passenger of the Ceres, and the claim to salvage by the freighters was dismissed. From this decree there was an appeal to the circuit court, where the decree of the district court was affirmed.

Libel of the owners, master and crew of the Ceres.

The libel of Nathaniel L. and George Griswold of the city of New York, merchants, Bartlet Shepherd of the same place, sea captain, and of Dennison Wood, late mate, Andrew Eddy, Thomas Ferris, John Brown, and Joseph Chaplis, seamen, and Joseph Lawrence, cook of the brig Ceres of New York, respectfully sets forth,

THAT your libellants, the said Nathaniel L. and George Griswold, are the owners of a certain brig called the Ceres, of which the said Bartlet Shepherd is master, and the said Dennison Wood, mate, the said Andrew Eddy, Thomas Ferris, John Brown and Joseph Chaplis, seamen, and the said Joseph Lawrence, cook, which said brig Ceres, on her return voyage from Havanna, loaded with sugars, &c. and destined for New York, *viz.* on or about the twenty-sixth day of August last, on the high seas, in latitude 32, and longitude 77½ W. of London, fell in with a certain brig or vessel, called as your libellants believe "The Cora," altogether deserted and derelict, with five feet water in the hold of the said brig, and with her rigging very much shattered and injured. Whereupon your libellants the said Bartlet Shepherd, Dennison Wood and others the crew of the said brig Ceres took possession of the said brig Cora; and after much difficulty and danger, and with the exposure of their lives and

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of the loss of the said brig Ceres, the said Cora was pumped out by some of the crew of the said brig Ceres and taken in tow by the said brig Ceres, and by her drawn towards land. That by order of your libellant the said Bartlet Shepherd, the said Dennison Wood, Andrew Eddy, and Thomas Ferris went on board of the said brig Cora, and have continued on board of her unto this time. That on or about the third day of September a violent squall came on which separated the said brig Ceres from the said brig Cora; and the said Dennison Wood and others on board the said Cora, in obedience to the orders they had received from the said Bartlet Shepherd, and as soon as the said squall had abated, by constant exertion, brought the said Cora into the port of Philadelphia, where they arrived on or about the fourteenth day of September.

Your libellants therefore pray, that the said brig Cora, her furniture, tackle, &c. together with her cargo, and every thing found on board of her, may be adjudged to them as deserted, derelict,* and by reason of the premises, having become the property of your libellants, in such parts or portions as to this honourable court may seem proper, and according to the laws and regulations of the admiralty.

RICHARD PETERS, jun.

proctor for the libellants.

* The claim to the Cora as a derelict, was afterwards given up, and the libellants proceeded for salvage only.

SALVAGE.

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The libel of Don Juan de Echevirria, a subject of his Catholic majesty, most respectfully sheweth,

Libel of the Spanish passenger.

THAT your libellant is, and for many years now last past has been, a captain or master of ships and vessels in the merchant service of Spain, duly licensed and admitted according to the marine law and regulation of that country; and as such is skilled and experienced in the navigation and management of ships and vessels. That on the fifth of June now last past, your libellant was owner and master of a certain Spanish brigantine called the Felix, and being with his said vessel in the course of a voyage, he was on that day captured on the high seas by a British privateer, and carried with his said vessel into the island of Jamaica, where his person was released and he received a passport from the British government there to go to Batavano, in the island of Cuba, from whence he went to the port of the Havanna: that it being his intention to go from thence to Montevideo on the Spanish American continent, he shipped himself as a passenger at the Havanna aforesaid on board a certain American brig, called the Ceres, Bartlet Shepherd master, of the burthen of one hundred and thirty-five tons, or thereabouts, bound to the port of New York, navigated by the said captain, his mate, and four seamen, making in all six persons, and there were no other persons on board, but the said six persons, the cook and your libellant, who was a passenger as aforesaid, and who agreed to pay to the said captain Shepherd, forty dollars, for the transportation of himself and his effects to New York. That they sailed from the Havanna on the seventeenth of the said month, and

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continued their voyage until they were in thirty-three degrees north latitude, and sixty-three degrees west longitude, something more or less, when they saw a sail in the evening under a heavy squall, which did not appear to be taking any precautions to guard against it. That your libellant insisted upon it to captain Shepherd, that there was nobody on board of the said vessel, on which he answered, that she might be a privateer, and that he did not want to go on board, the wind being favourable for continuing our navigation; that your libellant again represented to him that the said vessel had few or no people on board; on which, and on which only, he determined to speak her, which they did about seven o' clock in the evening, and after having hailed her several times, and nobody answering, it was thought proper to put out the long boat: that your libellant offered to go on board of the said vessel, but captain Shepherd would not permit it, but sent his mate with two men on board of her, who informed us that she was entirely deserted by her crew, and that she made a great deal of water. The boat returned with two more men, in order to pump out the water; but after having pumped the pumps almost dry, it was found that she did not make any water at all; and in the mean time, your libellant and two other persons were the only ones who remained on board of the Ceres, took in reefs, and did the work of that vessel until near midnight, when the boat returned from the deserted vessel. That the next morning at five o'clock captain Shepherd again put the boat to sea, for the purpose of overhauling the cargo of the deserted brig: he went in consequence to the brig with all his people, leaving the cook

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alone with this libellant, to take care of the Ceres; that your libellant with the said cook remained on board the Ceres, and kept tacking about until one o'clock in the afternoon, at which time they perceived a dismasted ship, and two of the mariners then returned with the captain on board the Ceres, leaving the mate and the two other mariners on board the deserted brig, with directions to sail after them and pursue the same course, but they were afterwards separated by a gale, and the deserted brig was brought into Philadelphia, where she is now libelled in this honourable court for salvage, by the name of the brig Cora; and your libellant further says, that the Ceres then sailed towards the dismasted ship, and having come within hailing distance, and found that there was nobody on board, captain Shepherd with his two mariners went on board of her and brought from thence sundry articles of apparel and furniture, such as sails, pieces of sail cloth, spy-glasses, compasses &c. and for the space of three hours while they were bringing the said articles, your libellant remained alone with the cook on board the Ceres, tacking about, and exerting themselves to keep her right, captain Shepherd not permitting him to go either on board the ship or the deserted brig, and thus they pursued their navigation until they arrived at New York. Your libellant, from the time that they first saw the deserted brig, working on board the said brig Ceres like a common seaman, and making extraordinary exertions from the small number of people that were on board; and your libellant never quitted the Ceres, nor ceased to assist in working on board of her until the whole cargo was delivered at New York aforesaid.

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And your libellant further says, That in consequence of the necessary assistance that he gave in working the Ceres, which was necessitated by part of her original crew being employed in the salvage of the deserted brig, and of articles out of the dismasted ship, and the risk of his life which he ran by being obliged to work the Ceres with a reduced number of men, and sometimes with the cook alone, he conceives that he has effectually assisted by his labour and danger in the said salvage, and is entitled to a reasonable part of the reward to be allowed by this honourable court for the same.

He therefore humbly prays, your honour will be pleased by your decree in the cause of salvage now pending before you, at the instance of the said Bartlet Shepherd, his owners and crew, to decree such a proportion of the said salvage to your libellant, as in your wisdom shall seem just, and he shall ever pray, &c.

P. S. Du Ponceau,
attorney for libellant.

Libel of the owners of goods on freight.

The libel of Daniel Ludlow and others, shippers of the cargo on board the brig Ceres for themselves and all others entitled humbly shews,

THAT on the twenty-sixth day of August, in the year of our Lord one thousand eight hundred and six, the said brig being on a voyage from the Havanna to New York, on the high seas, in latitude thirty-two degrees, and longitude seventy-four degrees and thirty minutes west from London, fell in with a certain brig or vessel, called as your libellants believe "The Cora," altogether deserted and dere-

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lict, with five feet water in her hold, and with her rigging much shattered and injured. Whereupon the crew of the said brig Ceres took possession of the said brig or vessel called the Cora, with much labour and difficulty, and with the exposure to imminent danger and loss of the cargo of the said brig Ceres. That the said vessel or brig called the Cora was taken in tow by the said brig Ceres, and by her drawn towards land. That some of the crew of the said brig Ceres went on board of the said brig or vessel called the Cora, and thereby left the said cargo in the said brig Ceres aforesaid in imminent risk or danger; and the said part of the crew of the Ceres afterwards, to wit, the day of September, in the year aforesaid, brought the said brig or vessel called the Cora into the port of Philadelphia.

Your libellants therefore pray, that such part or portion of the said brig or vessel called the Cora, her tackle, apparel and furniture, together with her cargo, or whatever else may be found on board of her may be adjudged to them as reasonable salvage as to this honourable court may seem proper, and according to the laws and regulations of the admiralty.

INGERSOLL, *proctor &c.*

Value of the Ceres and cargo.

The value of the Ceres was stated and agreed to be $ 4500, her freight and the property on board of her belonging to her owners was estimated at $ 4864 17, and the whole value of the goods on freight on board the Ceres, was $ 13,400.

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Value of the Cora and her cargo.

The Cora and her cargo were sold by the marshal, and produced $ 47,308 63; and the duties with the costs and expenses attending the proceedings amounting to $ 9989 37, left the net product of the sales $ 37,319 26.

The claim of the freighters to salvage was opposed by Rawle and Peters, jun. for the owners of the Ceres, and supported by Ingersoll for Ludlow and others, owners of that part of the cargo of the Ceres which was on freight.

In opposition to the claim it was urged that a deviation had been committed by the master of the Ceres, for which her owners were responsible, and who became insurers of the property of the freighters, from the time the deviation took place. Encountering all the risks incurred by the property on board the Ceres in bringing in the Cora, to them only ought the salvage, which would be allowed by the court, for the dangers to which the Ceres and her cargo were exposed, be given.

The case of the Blaireau,[a] decided in the supreme court of the United States, was not admitted as an authority in support of the claims of the freighters, as it was contended, one of the charterers and owners of the cargo of the Fame being on board of her, and consenting to the deviation committed by the Fame, in that case discharged her owner from his responsibility under the bills of loading and charter-party, and thus the charterers became entitled to part of the salvage. The case of the Jefferson,[b] was also to be rejected, as the captain of the finding vessel and owner of part of the cargo, could have no

[a] 2 Cranch 240.

[b] Ante vol. i, p. 46.

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claim on his owners for the loss of his goods after having himself committed the deviation. These, it was urged, were the only cases in which owners of cargo, who were not owners of the saving vessel, had received salvage.

On the part of the freighters it was stated, that the owners of the Ceres, and the master were the agents of the freighters for the purpose of transporting the cargo and not for any other, and that they had no right to put the property on freight at risk. That if the principle upon which the owners of the vessel claim salvage, for the risk encountered by the part of the cargo or freight was correct, it would extend to give the whole of the salvage to the master, as he, being the agent of the owners, would be responsible to them for the consequences of his deviation; and having the responsibility, he should be compensated for the risk incurred by it.

It was said, that as property at risk earned salvage, and the owners of the Ceres are entitled to salvage for the risk run by their vessel, the owners of the goods are equally entitled.

The case of the Blaireau was claimed as an authority in support of these positions, and it was alleged that the charterer Christie, could not discharge the responsibility of the owner of the Fame for that part of the property which belonged to the co-charterer, and yet the charterers were both allowed salvage.

The right of a vessel to stop in order to assist another in distress was contended for, and it was said the insurer was not affected by such a delay.

The removal of the case by appeal to the circuit court being determined on, no further argument

took place in the district court, and the following decree was given.

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DECREE.

I, RICHARD PETERS, judge of the district court of the United States in and for the district of Pennsylvania, having duly considered the libels filed in this case, and the several claims exhibited for salvage, as also the testimony adduced in support thereof, do thereupon adjudge, order and decree, as follows: that is to say—

Decree of the district court.

The libel of Daniel Ludlow, claiming salvage as owner of the cargo on board the Ceres, I dismiss with costs.

Claim by the freighters dismissed.

The gross amount of the sales of the said brigantine Cora and her cargo, as appears by the marshal's returns, is forty-seven thousand, three hundred and eight dollars, and sixty-three cents. Of this sum I adjudge, order and decree, that the salvors have and recover, in full satisfaction for and as salvage, the one-third part, or fifteen thousand seven hundred and sixty-nine dollars, and fifty-four cents to be apportioned in the following manner, that is to say—

One-third of the net proceeds allowed as salvage.

Nathaniel L. and George Griswold, the owners of the brigantine Ceres, shall receive and take one third part of the said sum of fifteen thousand seven hundred and sixty-nine dollars and fifty-four cents, or - - - - - $ 5256 51

Distribution.

The remaining two-third parts of the said sum of fifteen thousand, seven hundred and sixty-nine dollars and fifty-four

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cents, shall be divided into twenty-four equal parts or shares—whereof

Bartlett Shepherd, the master of the Ceres, shall receive and take	shares 6	$ 2628	26
Dennison Wood, the mate, shall receive and take	4	1752	17
Andrew Eddy, seaman	3	1314	14
Thomas Ferris do.	3	1314	14
John Brown do.	2	876	8
Joseph Chaplis, do.	2	876	8
Joseph Lawrence, cook	2	876	8
Don Juan de Echevirria, passenger	2	876	8
	Shares 24	$ 15769	54

And I finally adjudge, order and decree, that the duties, costs, charges and expenses shall be deducted from and paid out of the remaining two-thirds of the said gross amount of sales, and that the residue thereof shall be paid over to the libellant for the benefit of the concerned.

RICHARD PETERS.

From this decree an appeal was entered to the Circuit court of the United States and the case was fully argued before the honourable judge Washington. The claims of the freighters to salvage were opposed on the principles urged in the district court. Ingersoll and Duponceau for the freighters, Rawle and Peters, jun. for the owners of the Ceres.

The claim of Echeverria, the Spanish passenger was opposed on the testimony of one of the wit-

nesses, who stated he had not given aid to the Ceres when in time of difficulty and danger. The right of passengers to salvage, who assist in saving property found at sea, was not denied.

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Mr. Tilghman, for the British consul, opposed the decree of the district court allowing one third of the net proceeds of the Cora and cargo as salvage. A greater allowance was claimed by Rawle and Peters, jun. for the master, owners and crew of the Ceres. Judge Washington gave the following opinion.

In the circuit court of the United States, district of Pennsylvania.

Phineas Bond, esq. consul-general, &c.
versus
The Cora and her cargo.

1807.

Decision of the circuit court.

THIS is an appeal from the district court of Pennsylvania in a case of salvage. The case appears to be, that the brig Ceres on her return voyage from the Havanna to New York, laden with a cargo partly on freight, and partly belonging to the owners Nathaniel L. Griswold and George Griswold, commanded by Bartlet Shepherd, and a crew consisting of the mate, four seamen, and the cook, having on board one passenger, on the twenty-sixth of August fell in with the brig Cora, an English vessel, in lat. 32, and long. 74½ W. from London. The captain of the Ceres having hailed the Cora, and receiving no answer, he boarded and found her with a valuable cargo on board, but wholly deserted.

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He put on board the Cora the mate of the Ceres, Dennison Wood, and two of the mariners, Andrew Eddy and Thomas Ferris, with orders to keep company with the Ceres. On the twenty-eighth the Cora was taken in tow by the Ceres, but they were soon separated by the breaking of the hawser. The two vessels however kept company until the third of September, when a violent gale came on and separated the vessels, but not until the captain had given orders to the mate to make for the nearest port. It appears, that it was with great difficulty the Ceres could be navigated in consequence of the diminution of the crew, and she was exposed on that account to considerable danger and loss of her rigging.

The Cora when she was boarded had five feet water in her hold. The hands put on board were employed from the night of the twenty-sixth to the twenty-eighth in pumping her out. It appears that the mate and the seamen on board the Cora encountered many difficulties, and were exposed to much danger during the storm. When that subsided, they bore away for the nearest port, took a pilot on the seventh, and anchored within the bay of Delaware on the eighth day of September. The Ceres came to anchor on the eleventh off Sandy Hook.

Libels for salvage were filed by the owners, the captain and crew of the Ceres, the freighters, and by Mr. Echevirria, the Spanish passenger.

The district court having decreed one-third of the gross amount of the sales of the Cora and cargo, as salvage, cross appeals were entered.

The first question to be decided is, the rate of salvage which ought to be allowed to the salvors.

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Principles by which the rate of salvage should be regulated.

Adopting the expressions, as I do the sentiments, of the district judge in the case of La Belle Creole,[a] the salvage allowed should comprehend a reward for the risk of life and property, labour and danger in the undertaking, and should be so liberal as to afford a sufficient inducement to preserve the lives and property of others.

In appreciating and properly rewarding such services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case, can be laid down, and yet men possessing equal liberality and minds equally intelligent, would vary very materially from each other in fixing the quantum of reward. But although no certain rule can be establishhed to govern every possible case, yet it is proper to refer to former decisions in cases not very dissimilar from the one under consideration, from which principles may be extracted which may and ought to be regarded.

In searching for something like a general rule through the numerous cases which have been decided as to the rate of salvage, it appears, that except in cases of very great or very small hazard, or when the property saved has been to the property at risk in a ratio very much beyond, or very far short of a fair compensation for the service rendered or the risk incurred, the salvage allowed is about the proportion decreed in this case. It is unnecessary to go through all the cases upon this subject, because I think that of the Blaireau, which is of the first authority in this court, does in all its cir-

[a] Ante vol. i, page 31.

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cumstances as nearly resemble the present as any I have met with.

In that case one mariner was found on board the Blaireau, and in this the vessel was found totally deserted. This it is contended makes the former a case of less merit than the present. But I can discern no material difference between the cases, except that the navigation of the two vessels was rendered less dangerous by the addition of Tool, the man found on board the Blaireau. The Cora was deserted, but not abandoned. This was in effect the case of the Blaireau, as it is clear that Tool's remaining on board that vessel was not a voluntary act but merely accidental.

No abandonment in this case.

The Blaireau had a navigation of nearly three thousand miles before she reached a port of safety. The Cora had scarcely half as far to go; but I believe it to be a fact, that the danger is greater when vessels approach the American coast; and besides it does not appear in that case that the Fame and the Blaireau experienced any very severe weather in coming in, whereas the Ceres and Cora were exposed to a violent tempest. The Blaireau was an indifferent vessel, was considerably injured, and required pumping frequently to keep her clear. The Cora was perfectly strong and well constructed. In these respects the merits of the salvors in the former exceeded those of the salvors in the latter case. On the other hand the Fame retained on board more than two-thirds of her hands, and it does not appear that the seven hands left with the Blaireau were insufficient to navigate her.

Comparing these cases together, I cannot think

of increasing the salvage allowed by the district court; and on the other hand considering the risk, to which both the Ceres and the Cora were exposed in consequence of the insufficient number of hands by which they were respectively navigated, and recollecting no case of equal merit with the present where less than one third has been allowed, I do not feel disposed to diminish this allowance.

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The next consideration is, how ought this salvage to be distributed? The rights of the owners of the vessel and freight, and of the master and crew are not questioned. But those persons contest the claims of the freighters and of the passenger.

First, as to the freighters. Salvage being intended as a reward for meritorious services performed, and to encourage others to similar exertions wherever the occasion may occur, it follows, that all those who risk their property are entitled to participate in the reward. It is contended for the freighters, that the acts done by the Ceres, amounted to a deviation, which discharged the underwriters in case the cargo was insured, and incurred the risk of safe arrival, if the freighter stood his own insurer.

Claim of the freighters.

This proposition presents two questions. First, was there a deviation? and secondly if there was, on whom would the loss have fallen had the Ceres not arrived?

1. The general definition of deviation, is the voluntary departure from the voyage insured, without necessity or reasonable cause; and I know of no case where the justification is not essentially connected with the safety of the property insured.

Definition of deviation.

If the object of the deviation be to save the life

Deviation to save life.

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of man, I will not be the first judge to exclude such a case from the exceptions to the general rule. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence.

When underwriters are discharged by deviation.

But after this object is effected, if the stoppage be continued, or the risk increased by adding to the cargo, diminishing the crew, or by other means for the purpose of saving the property found, I think the underwriters are discharged.

For let me ask—If salvage be allowed to the owner in consideration of the risk to which his property is exposed, where is the risk if he is insured; and if the act which produces the risk do not discharge the underwriters, upon what principle shall they take the risk, and the insured receive the reward.

It is said to be for the general benefit of underwriters, to permit the insured to save property found at sea without considering the act a deviation. But I suspect that underwriters are too well acquainted with their interests to yield a ready assent to this proposition. The underwriters on the saving vessel would take upon themselves an increased risk without receiving an increased reward; and the insurers on the property saved could find no inducement to those who have the power to save it, since a liberal salvage will never fail to stimulate their exertions. The former can never derive a benefit from an act which increases their risk, and the latter can feel no motive for consenting to encounter a similar danger, when in turn they may be insurers on the saving vessel.

If then an act similar to the one performed by the Ceres amount to a deviation, what in the second place is the risk to which the freighter's property is

exposed. Whether he be insured or not, the owner of the vessel is responsible to him if a loss happens in consequence of the deviation. If so, then it is the owner of the vessel, and not the freighter who risks the value of the cargo, as well as that of the vessel and freight.

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Owners of the vessel responsible to freighters for consequences of deviation

But it is contended that the owner may be worth nothing, in which case the freighter would lose his indemnity. To this there are two answers. First, the owner of the vessel is trusted at any rate by the freighter, and is consequently deemed sufficient to answer for every unlawful act of the master; and secondly, the argument can never apply but in a case where the court which is distributing salvage, is satisfied that the fact of insolvency exists. I will not say, that in such a case the court ought not upon principles of equity, decree to the freighter, what otherwise the owner would have been entitled to.

Insolvent owner of vessel which has committed a deviation.

Thus the question seems to stand in point of principle. As to authority it is admitted that no instance can be found of salvage being allowed to the freighter in a case resembling the present. In the case of the Mary Ford, though the George had a valuable cargo on board on freight, yet the whole salvage was given to the owner of the vessel and the crew. In the case of the Jefferson, decided in the district court of New York, the owners of the vessel were also owners of a part of the cargo, and the master was owner of the balance. They were properly allowed salvage in consideration of their respective interests in the cargo, because the risk of deviation fell upon them.

It is unreasonable to suppose, that in the multitude of cases that have been cited, some of the sav-

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ing vessels should not have had cargoes on freight; and yet in not one, except the Blaireau, does it appear, that even the claim of a freighter has been interposed. This is certainly strong evidence of the general understanding of legal and commercial men as to the rights of such a claimant.

Case of the Blaireau.

We now come to the case of the Blaireau, in which the freighter was allowed salvage in proportion to the value of his property on board. The court considered the cargo as being at his risk in consequence of the consent of Christie, one of the joint owners of it, to those acts which increased the risk. But as the right of a ship-owner to freight arose out of an express contract, it was not considered that a permission to stop for the relief of the Blaireau, which was as well for the benefit of the owner and crew as of the freighter, could by implication release the owner from his obligations to carry the cargo safely, before he could claim his freight. No doubt but that the court considered the acts of Christie binding on Jackson, but those acts were not such as operated to vary the contract respecting the freight, though they were construed to go so far as to charge Christie and Jackson with the hazards to be encountered by the cargo.

Insurances on vessel and freight under the circumstances of the Blaireau and Cora void. Freighter to be indemnified by owner in case of loss.

It appears to me, that the case of the Blaireau is a strong one in its application to the present. It clearly establishes the following principles. First, that by acts similar to those done in the two cases, the insurances which had been effected on the vessel and freight was at an end. Second, that the freighter is indemnified by the owner in case of loss arising from such acts of the master, and consequently is not entitled to salvage, except when he

does some act which discharges the owner from his responsibility.

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The only remaining question respects the claim of Don Juan de Echevirria, a passenger on board the Ceres at the time the Cora was found. The facts which seem not to be disputed are, that this man being at the Havanna, took his passage on board the Ceres for New York, and was to pay forty dollars. That he had been accustomed to the navigation of vessels, and had commanded them in the merchant service of Spain. That he assisted in the navigation of the Ceres before and after the Cora was found, whenever the weather was fair. The captain's declarations, if they can be received in evidence, testify his merit and usefulness on all occasions during the voyage; though it is said by one witness that this claimant would afford no assistance in tempestuous weather.

Claim of the Spanish passenger.

Without taking into consideration these declarations of the captain, but without deciding in favour or against the propriety of admitting such evidence in a case precisely like the present,* I am satisfied that this claimant is entitled to the share of

* The evidence offered was, the declarations of the captain relative to the conduct of the passenger. These declarations were proved by persons who had lodged with the captain after his arrival in New-York. The admission of this testimony, was opposed on the principle that as the allowance to the passenger would be taken from the sum which would be distributed among the *crew of the Ceres*, and would not affect the amount to be given to the captain, it would be introducing as evidence the declarations of a stranger who was not on oath when they were made.

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a common seaman, in which capacity it is admitted he acted in navigating the vessel. It is too much to expect that I can credit what is said by the witness who testifies as to his general conduct, that at a time of danger which was rendered imminent by the scarcity of hands on board, a skilful navigator, whose life in common with every person around him was at stake, would at such a time above all others, withdraw himself, or would have been permitted to withdraw himself, from the common exertions to preserve the vessel and the lives of the crew.

Distribution of the salvage allowed.

In making the distribution of this salvage, I shall follow the rule which seems to have governed the supreme court in the case of the Blaireau, so far as it applies. I shall, therefore, allow to the owners of the vessel one-third part of the salvage, and divide the residue into twenty-four parts, whereof six shall go to the captain, four to the mate, and three to the two seamen who navigated the Cora, and whose danger and labour greatly exceeded that of the crew on board the Ceres, two shares to each of the mariners on board the Ceres, and the same proportion to Echevirria, the Spanish passenger.

Proportion allowed to the owners of the Ceres.

It is true that although the owner receives in this case the same proportion as was allotted to the owner and freighter in the case of the Blaireau, yet it will not bear the same proportion to the property at risk. But I think with the judge of the district court, as reported in one of the cases which were cited, that the proportion ought not to be regarded so much as the actual sum received by the salvors.

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If the property saved be considerable, the proportion allowed will of course increase the reward, both as it respects the property at risk, and the personal danger and labour of the salvors. If it is small, this reward will be diminished; and so it ought to be, because upon the principle of equality in which consists the highest equity, a reasonable part of the thing saved should remain to the original owner of the whole. But where the usual proportions of the property saved would afford a very inadequate reward to the owners of the property at risk, or to the salvors, this might afford a good reason for increasing the proportion of salvage, with a view to such compensation, but without at the same time losing sight of the owners of the property saved.

Taking all these circumstances into consideration, I am satisfied that the sum allowed to the owners in this instance is less in proportion to the property they had at risk, than was allowed to the owners in the case of Blaireau, still it is sufficiently ample and liberal.

Decree of the district court affirmed.

The decree of the district court must therefore be affirmed.

Erick Singstrom and others,
versus
The schooner Hazard.

1807.

The mariners were taken from on board the Hazard by a French privateer, and the vessel sent into Cumana, and afterwards liberated. The seamen escaped from the privateer, and returned to the port of Philadelphia, some of them earning wages, others working their passages home. The Hazard performed her voyage, and returned to Philadelphia. The district court decreed wages to the seamen for the voyage, deducting whatever they had earned, after their separation from the Hazard. From this decree there was an appeal to the circuit court, and the decree of the district court was affirmed.

LIBEL.

To the honourable Richard Peters, esq. judge of the district court of the United States, in and for the Pennsylvania district.

The libel of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer

HUMBLY SHEWETH,

THAT your libellants shipped on board the schooner Hazard, N. D. Gardner, master, on the thirteenth day of April, in the year one thousand eight hundred and six, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba in the West Indies, at the monthly wages of twenty-two dollars. That while they were proceeding on their said voyage, *to wit*, on the eighth day of May in the year aforesaid, the said schooner was captured by a French privateer, called the Superb, and your libellants were made prisoners, and taken on board the said privateer. That they remained on board the said privateer a considerable time, and until an opportunity offered of effecting their escape therefrom. That your libellants Francis Summers, and James Dyer, after incurring many hardships got a passage to New York on board the brig

Singstrom et al. vs. the Hazard.

Thetis. That your libellant got on board the sloop Hannah, bound to New York, to which place he worked his passage. That your libellant Erick Singstrom was kept on board the said privateer until she went to the port of Cumana, where he found the said schooner Hazard, she having been liberated by the French, after being carried into Cumana. That as soon as he the said Erick found the said schooner in the said port of Cumana, he made his escape from the said privateer, and went on board the said schooner Hazard, and returned therein to the port of Philadelphia. That your libellants lost all their clothes, and received no wages whatever, except your libellant Erick Singstrom received four doubloons from the captain of the said privateer for repairing his mast, there being no person on board capable of doing it. That your libellants were forced from on board the said schooner by a superior power, and greatly contrary to their will; and they are therefore entitled, by the maritime law and the customs and usages of nations to their wages, as if they had been actually on board the said schooner. That the said schooner arrived at the port of Philadelphia after performing her destined voyage, on the thirteenth day of November in the year aforesaid. That there are due to your libellants Francis Summers, Cato Lewis and James Dyer respectively, the sums of one hundred and thirty-two dollars; and your libellant Erick Singstrom, deducting the four doubloons, (or sixty-four dollars) the sum of sixty-eight dollars. That the said schooner is now lying in the port of Philadelphia, and within the jurisdiction of this honourable court. Wherefore, your libellants pray, that she may be attached, condem-

Singstrom et al. vs. the Hazard.

ned and sold, together with her tackle, apparel and furniture, for the payment of the aforesaid wages, according to the laws of the United States, and the usages and customs of maritime courts; and they will ever pray, &c.

JNO. L. LEIB, *proctor for the libellants.*

ANSWER.

To the honourable Richard Peters, esq. judge of the district court of Pennsylvania, in and for the Pennsylvania district.

THE answer of Callender and Shipley, owners of the schooner Hazard, to the bill and libel filed of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer who have attached the said schooner by process from this court.

Your respondents reserving to themselves now and at all times hereafter, all manner of advantage and benefit of exceptions that may be had and taken to the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' libel, for a full and perfect answer thereto, or to such parts thereof, as it materially concerns the respondents to make answer, they answer and say,

That true it is the libellants shipped as stated in the libel, on board the schooner Hazard, on the thirteenth day of April, one thousand eight hundred and six, at the rate of twenty-two dollars per month, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba, in the West Indies, and home. That while they were proceeding

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said Erick, one of the libellants, had been on board the privateer aforesaid called the Superb.

The said Erick, one of the libellants, further acknowledged and declared, that the commander of the privateer aforesaid called the Superb, offered him the said Erick one of the libellants aforesaid, three shares of prize-money of such vessels as they should capture, if he would again go on board the privateer aforesaid upon another cruize, but the said Erick the libellant aforesaid refused.

Your respondents also inform the honourable court that the other libellants, *to wit*, Francis Summers, Cato Lewis and James Dyer received and divided a share of prize-money of the prize or prizes so captured by the privateer Superb aforesaid. All which matters and things these respondents are ready to aver, maintain and prove to this honourable court.

Your respondents therefore pray the honourable court that the said schooner Hazard, her tackle apparel and furniture may be discharged with reasonable costs and charges in this behalf by these respondents wrongfully sustained.

SAMSON LEVY,
Proctor for the respondents.

REPLICATION.

AND the said libellants reply and say, That by any thing in the said respondents' answer to these complainants' libel, they ought not to be prevented from the recovery of their wages in their said libel demanded, because they say, that all and singular

the matters and things by them in their libel aforesaid set forth are just and true, and this they are ready to verify. Wherefore they pray as before they have prayed.

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Cranmer, et al. mariners,
versus
Richard Gernon, owner of the ship Baltic.

1807.

Claim of wages by seamen belonging to a ship which had been captured on her homeward voyage.

THE mariners had shipped to perform a voyage from Philadelphia to the Isle of France and to return to Philadelphia. The Baltic was detained a considerable time at the Isle of France, waiting for a cargo, which she could not obtain in consequence of the intercourse between Bourbon and the Isle of France being interrupted by a British blockading squadron. These difficulties continuing, the Baltic sailed for Bourbon, taking with her a very small part of her outward cargo and also a number of passengers, who with their baggage and a small quantity of sugar supposed to belong to them, were landed at Bourbon. The Baltic there completed her loading and sailed for Philadelphia, but was captured and sent into a British port in the West Indies. The seamen, with the consent of the master of the Baltic, left her and returned to Philadelphia, and now claimed their wages up to half the time the ship was at Bourbon, admitting that the residue would depend on the fate of the Baltic. By the counsel for the owner it was suggested that the voyage from the Isle of France to Bourbon was a consequence of the interruption of

the intercourse between these places by the British squadron, and that it is not usual for vessels to proceed to Bourbon, as the produce of that place is, under other circumstances, brought up to the Isle of France in boats, and there put on board the ships destined to receive it. This was urged, with other arguments, to destroy the claims of the seamen to wages after the vessel left the Isle of France. The case was not decided, as the owner requested a postponement, for the purpose of ascertaining from the master of the Baltic, the sums which had been paid to the seamen; but the judge said he had decided that when a vessel bound to a port, which was found on her arrival near it to be blockaded, and therefore the ship had been turned off, and proceeded to another port, though not originally contemplated in the articles under which the seamen shipped, yet if the cargo, or any part, was there delivered, it should be considered as a delivering port as much as if originally so intended. And if the vessel, after leaving that port, was captured or lost, the mariners were entitled to the wages due to the time of arrival at that port, and for half the time of stay there.

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LIBEL.

To the honourable Richard Peters, esq. judge of the district court of the United States, in and for the Pennsylvania district.

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Thetis. That your libellant got on board the sloop Hannah, bound to New York, to which place he worked his passage. That your libellant Erick Singstrom was kept on board the said privateer until she went to the port of Cumana, where he found the said schooner Hazard, she having been liberated by the French, after being carried into Cumana. That as soon as he the said Erick found the said schooner in the said port of Cumana, he made his escape from the said privateer, and went on board the said schooner Hazard, and returned therein to the port of Philadelphia. That your libellants lost all their clothes, and received no wages whatever, except your libellant Erick Singstrom received four doubloons from the captain of the said privateer for repairing his mast, there being no person on board capable of doing it. That your libellants were forced from on board the said schooner by a superior power, and greatly contrary to their will; and they are therefore entitled, by the maritime law and the customs and usages of nations to their wages, as if they had been actually on board the said schooner. That the said schooner arrived at the port of Philadelphia after performing her destined voyage, on the thirteenth day of November in the year aforesaid. That there are due to your libellants Francis Summers, Cato Lewis and James Dyer respectively, the sums of one hundred and thirty-two dollars; and your libellant Erick Singstrom, deducting the four doubloons, (or sixty-four dollars) the sum of sixty-eight dollars. That the said schooner is now lying in the port of Philadelphia, and within the jurisdiction of this honourable court. Wherefore, your libellants pray, that she may be attached, condem-

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REPLICATION.

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while her cargo was collecting, and brought in drogers or lighters, or go to the ports whereat it was purchased, as part of her cargo for her return voyage.

Afterwards, wages until the time of arrival at Bourbon and for half the time the Baltic remained there, were decreed by the court.

MARINERS DESERTING A VESSEL ON SHORE.

Joseph Sims, owner of the ship Woodrop Sims,
versus
Sundry mariners,

1807.

Habeas corpus ex-parte the mariners, issued by judge Peters to the keeper of the Philadelphia prison.

The mariners had deserted from a ship on shore and in a perilous situation, and were confined at the instance of the master. The judge considered the voyage *broken up* by the misfortunes of the ship, and discharged the mariners from imprisonment.

TEN mariners, of the ship Woodrop Sims, were committed by the mayor of the city of Philadelphia, on the oath of the owner of that vessel, charged with deserting the ship on her out passage and being absent without leave. The act of congress for the government of seamen in the merchants' service, directs, that this shall be done "*upon the complaint of the master*," which did not appear to have been made directly, though a letter from the master was produced, requesting the owner to have the seamen apprehended as deserters.

It was conceded by the owner, that the vessel was cast on shore in the bay of Delaware; and lay in a doubtful and perilous situation; though hopes were entertained at some times, and doubts at others, that she would be got off.—The latest accounts were very unfavorable.

Bail was offered for one of the seamen. Another mariner, though involved in the general charge of desertion, was admitted to prove a permission to the one tendering bail from the master, to leave the ship. The witness was so admitted, because, though involved in the same charge, cases of indi-

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The mariners were taken from on board the Hazard by a French privateer, and the vessel sent into Cumana, and afterwards liberated. The seamen escaped from the privateer, and returned to the port of Philadelphia, some of them earning wages, others working their passages home. The Hazard performed her voyage, and returned to Philadelphia. The district court decreed wages to the seamen for the voyage, deducting whatever they had earned, after their separation from the Hazard. From this decree there was an appeal to the circuit court, and the decree of the district court was affirmed.

LIBEL.

To the honourable Richard Peters, esq. judge of the district court of the United States, in and for the Pennsylvania district.

The libel of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer

HUMBLY SHEWETH,

THAT your libellants shipped on board the schooner Hazard, N. D. Gardner, master, on the thirteenth day of April, in the year one thousand eight hundred and six, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba in the West Indies, at the monthly wages of twenty-two dollars. That while they were proceeding on their said voyage, *to wit*, on the eighth day of May in the year aforesaid, the said schooner was captured by a French privateer, called the Superb, and your libellants were made prisoners, and taken on board the said privateer. That they remained on board the said privateer a considerable time, and until an opportunity offered of effecting their escape therefrom. That your libellants Francis Summers, and James Dyer, after incurring many hardships got a passage to New York on board the brig

Singstrom et al. vs. the Hazard.

Thetis. That your libellant got on board the sloop Hannah, bound to New York, to which place he worked his passage. That your libellant Erick Singstrom was kept on board the said privateer until she went to the port of Cumana, where he found the said schooner Hazard, she having been liberated by the French, after being carried into Cumana. That as soon as he the said Erick found the said schooner in the said port of Cumana, he made his escape from the said privateer, and went on board the said schooner Hazard, and returned therein to the port of Philadelphia. That your libellants lost all their clothes, and received no wages whatever, except your libellant Erick Singstrom received four doubloons from the captain of the said privateer for repairing his mast, there being no person on board capable of doing it. That your libellants were forced from on board the said schooner by a superior power, and greatly contrary to their will; and they are therefore entitled, by the maritime law and the customs and usages of nations to their wages, as if they had been actually on board the said schooner. That the said schooner arrived at the port of Philadelphia after performing her destined voyage, on the thirteenth day of November in the year aforesaid. That there are due to your libellants Francis Summers, Cato Lewis and James Dyer respectively, the sums of one hundred and thirty-two dollars; and your libellant Erick Singstrom, deducting the four doubloons, (or sixty-four dollars) the sum of sixty-eight dollars. That the said schooner is now lying in the port of Philadelphia, and within the jurisdiction of this honourable court. Wherefore, your libellants pray, that she may be attached, condem-

Singstrom et al. vs. the Hazard.

ned and sold, together with her tackle, apparel and furniture, for the payment of the aforesaid wages, according to the laws of the United States, and the usages and customs of maritime courts; and they will ever pray, &c.

JNO. L. LEIB, *proctor for the libellants.*

ANSWER.

To the honourable Richard Peters, esq. judge of the district court of Pennsylvania, in and for the Pennsylvania district.

THE answer of Callender and Shipley, owners of the schooner Hazard, to the bill and libel filed of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer who have attached the said schooner by process from this court.

Your respondents reserving to themselves now and at all times hereafter, all manner of advantage and benefit of exceptions that may be had and taken to the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' libel, for a full and perfect answer thereto, or to such parts thereof, as it materially concerns the respondents to make answer, they answer and say,

That true it is the libellants shipped as stated in the libel, on board the schooner Hazard, on the thirteenth day of April, one thousand eight hundred and six, at the rate of twenty-two dollars per month, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba, in the West Indies, and home. That while they were proceeding

on the voyage aforesaid, *to wit*, on the eighth day of May in the year aforesaid. The schooner aforesaid with the libellants were captured by a French privateer, called the Superb, and the libellants were carried as prisoners in the first instance, on board the privateer aforesaid, and continued on board during a cruize the privateer made, on which cruize the privateer captured and made a prize. That the libellants severally did duty on board the privateer aforesaid, more especially and particularly Erick Singstrom, who remained on board the aforesaid privateer until she arrived at Barracoa, in Cuba, at which place the schooner aforesaid, owned by your respondents, was then lying under the command of N. D. Gardiner, when and where the aforesaid Erick Singstrom returned to the schooner aforesaid, and solicited and requested of the said captain N. D. Gardiner, the commander of the said schooner, to carry him the said Erick as a passenger to work his passage back to Philadelphia, on board the said schooner, to which proposition the said captain N. D. Gardiner agreed, and brought back the said Erick in the capacity aforesaid. The respondents give the honourable court to understand and be informed, that the said Erick Singstrom, one of the libellants, acknowledged the captain of the privateer aforesaid had given him several doubloons, *to wit*, the number of four, (or sixty-four dollars,) for work, labour and service done as a ship carpenter, in fishing or mending a mast that had been shattered or splintered in an engagement. And that he the said Erick had actually received two shares of prize money from the proceeds of the capture made by the Superb, during the time the

Singstrom et al. vs. the Hazard.

MARINERS' WAGES.

Crammer, et al. mariners,
versus
Richard Gernon, owner of the ship Baltic.

1807.

Claim of wages by seamen belonging to a ship which had been captured on her homeward voyage.

THE mariners had shipped to perform a voyage from Philadelphia to the Isle of France and to return to Philadelphia. The Baltic was detained a considerable time at the Isle of France, waiting for a cargo, which she could not obtain in consequence of the intercourse between Bourbon and the Isle of France being interrupted by a British blockading squadron. These difficulties continuing, the Baltic sailed for Bourbon, taking with her a very small part of her outward cargo and also a number of passengers, who with their baggage and a small quantity of sugar supposed to belong to them, were landed at Bourbon. The Baltic there completed her loading and sailed for Philadelphia, but was captured and sent into a British port in the West Indies. The seamen, with the consent of the master of the Baltic, left her and returned to Philadelphia, and now claimed their wages up to half the time the ship was at Bourbon, admitting that the residue would depend on the fate of the Baltic. By the counsel for the owner it was suggested that the voyage from the Isle of France to Bourbon was a consequence of the interruption of

the intercourse between these places by the British squadron, and that it is not usual for vessels to proceed to Bourbon, as the produce of that place is, under other circumstances, brought up to the Isle of France in boats, and there put on board the ships destined to receive it. This was urged, with other arguments, to destroy the claims of the seamen to wages after the vessel left the Isle of France. The case was not decided, as the owner requested a postponement, for the purpose of ascertaining from the master of the Baltic, the sums which had been paid to the seamen; but the judge said he had decided that when a vessel bound to a port, which was found on her arrival near it to be blockaded, and therefore the ship had been turned off, and proceeded to another port, though not originally contemplated in the articles under which the seamen shipped, yet if the cargo, or any part, was there delivered, it should be considered as a delivering port as much as if originally so intended. And if the vessel, after leaving that port, was captured or lost, the mariners were entitled to the wages due to the time of arrival at that port, and for half the time of stay there.

Crammer et al. v. Gernon.

The port to which a vessel may proceed and land her cargo after being turned off from her port of destination in consequence of its being blockaded, to be considered the port of delivery.

It was also the opinion of the judge, and he said he had so decided, that where a cargo, or part thereof, was purchased at neighbouring ports or places, and the vessel went to one or more of them for all or part; the last port of lading and departure should be that to which the payment of wages should apply. The seamen must be paid for the time they serve; and it is immaterial whether the ship lay at the port of her original destination,

When a cargo is purchased at several neighbouring ports and the vessel proceeds to each of them to receive it, the last port of lading is that to which wages should be paid.

Erick Singstrom and others,
versus
The schooner Hazard.

1807.

The mariners were taken from on board the Hazard by a French privateer, and the vessel sent into Cumana, and afterwards liberated. The seamen escaped from the privateer, and returned to the port of Philadelphia, some of them earning wages, others working their passages home. The Hazard performed her voyage, and returned to Philadelphia. The district court decreed wages to the seamen for the voyage, deducting whatever they had earned, after their separation from the Hazard. From this decree there was an appeal to the circuit court, and the decree of the district court affirmed.

LIBEL.

To the honourable Richard Peters, esq. judge of the district court of the United States, in and for the Pennsylvania district.

The libel of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer

HUMBLY SHEWETH,

THAT your libellants shipped on board the schooner Hazard, N. D. Gardner, master, on the thirteenth day of April, in the year one thousand eight hundred and six, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba in the West Indies, at the monthly wages of twenty-two dollars. That while they were proceeding on their said voyage, *to wit*, on the eighth day of May in the year aforesaid, the said schooner was captured by a French privateer, called the Superb, and your libellants were made prisoners, and taken on board the said privateer. That they remained on board the said privateer a considerable time, and until an opportunity offered of effecting their escape therefrom. That your libellants Francis Summers, and James Dyer, after incurring many hardships got a passage to New York on board the brig

Singstrom et al. vs. the Hazard.

Thetis. That your libellant got on board the sloop Hannah, bound to New York, to which place he worked his passage. That your libellant Erick Singstrom was kept on board the said privateer until she went to the port of Cumana, where he found the said schooner Hazard, she having been liberated by the French, after being carried into Cumana. That as soon as he the said Erick found the said schooner in the said port of Cumana, he made his escape from the said privateer, and went on board the said schooner Hazard, and returned therein to the port of Philadelphia. That your libellants lost all their clothes, and received no wages whatever, except your libellant Erick Singstrom received four doubloons from the captain of the said privateer for repairing his mast, there being no person on board capable of doing it. That your libellants were forced from on board the said schooner by a superior power, and greatly contrary to their will; and they are therefore entitled, by the maritime law and the customs and usages of nations to their wages, as if they had been actually on board the said schooner. That the said schooner arrived at the port of Philadelphia after performing her destined voyage, on the thirteenth day of November in the year aforesaid. That there are due to your libellants Francis Summers, Cato Lewis and James Dyer respectively, the sums of one hundred and thirty-two dollars; and your libellant Erick Singstrom, deducting the four doubloons, (or sixty-four dollars) the sum of sixty-eight dollars. That the said schooner is now lying in the port of Philadelphia, and within the jurisdiction of this honourable court. Wherefore, your libellants pray, that she may be attached, condem-

Singstrom et al. vs. the Hazard.

ned and sold, together with her tackle, apparel and furniture, for the payment of the aforesaid wages, according to the laws of the United States, and the usages and customs of maritime courts; and they will ever pray, &c.

JNO. L. LEIB, *proctor for the libellants.*

ANSWER.

To the honourable Richard Peters, esq. judge of the district court of Pennsylvania, in and for the Pennsylvania district.

THE answer of Callender and Shipley, owners of the schooner Hazard, to the bill and libel filed of Erick Singstrom, Francis Summers, Cato Lewis and James Dyer who have attached the said schooner by process from this court.

Your respondents reserving to themselves now and at all times hereafter, all manner of advantage and benefit of exceptions that may be had and taken to the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' libel, for a full and perfect answer thereto, or to such parts thereof, as it materially concerns the respondents to make answer, they answer and say,

That true it is the libellants shipped as stated in the libel, on board the schooner Hazard, on the thirteenth day of April, one thousand eight hundred and six, at the rate of twenty-two dollars per month, to perform a voyage from the port of Philadelphia to the island of St. Jago de Cuba, in the West Indies, and home. That while they were proceeding

on the voyage aforesaid, *to wit*, on the eighth day of May in the year aforesaid. The schooner aforesaid with the libellants were captured by a French privateer, called the Superb, and the libellants were carried as prisoners in the first instance, on board the privateer aforesaid, and continued on board during a cruize the privateer made, on which cruize the privateer captured and made a prize. That the libellants severally did duty on board the privateer aforesaid, more especially and particularly Erick Singstrom, who remained on board the aforesaid privateer until she arrived at Barracoa, in Cuba, at which place the schooner aforesaid, owned by your respondents, was then lying under the command of N. D. Gardiner, when and where the aforesaid Erick Singstrom returned to the schooner aforesaid, and solicited and requested of the said captain N. D. Gardiner, the commander of the said schooner, to carry him the said Erick as a passenger to work his passage back to Philadelphia, on board the said schooner, to which proposition the said captain N. D. Gardiner agreed, and brought back the said Erick in the capacity aforesaid. The respondents give the honourable court to understand and be informed, that the said Erick Singstrom, one of the libellants, acknowledged the captain of the privateer aforesaid had given him several doubloons, *to wit*, the number of four, (or sixty-four dollars,) for work, labour and service done as a ship carpenter, in fishing or mending a mast that had been shattered or splintered in an engagement. And that he the said Erick had actually received two shares of prize money from the proceeds of the capture made by the Superb, during the time the

Singstrom et al. vs. the Hazard.

said Erick, one of the libellants, had been on board the privateer aforesaid called the Superb.

The said Erick, one of the libellants, further acknowledged and declared, that the commander of the privateer aforesaid called the Superb, offered him the said Erick one of the libellants aforesaid, three shares of prize-money of such vessels as they should capture, if he would again go on board the privateer aforesaid upon another cruize, but the said Erick the libellant aforesaid refused.

Your respondents also inform the honourable court that the other libellants, *to wit*, Francis Summers, Cato Lewis and James Dyer received and divided a share of prize-money of the prize or prizes so captured by the privateer Superb aforesaid. All which matters and things these respondents are ready to aver, maintain and prove to this honourable court.

Your respondents therefore pray the honourable court that the said schooner Hazard, her tackle apparel and furniture may be discharged with reasonable costs and charges in this behalf by these respondents wrongfully sustained.

SAMSON LEVY,
Proctor for the respondents.

REPLICATION.

AND the said libellants reply and say, That by any thing in the said respondents' answer to these complainants' libel, they ought not to be prevented from the recovery of their wages in their said libel demanded, because they say, that all and singular

the matters and things by them in their libel aforesaid set forth are just and true, and this they are ready to verify. Wherefore they pray as before they have prayed. Singstrom et al. vs. the Hazard.

JNO. L. LEIB, *proctor for the libellants.*

THE district court ordered the payment of wages to the seamen until the return of the Hazard to Philadelphia, deducting the sums they had earned or received after they were taken from the Hazard, and until their return to Philadelphia. From this decree the respondents appealed to the circuit court of the United States for the district of Pennsylvania, and the appeal was heard by the honourable judge Washington, at the April sessions, 1807. The decree of the district court was affirmed.

Dixon et al. *vs.* the Cyrus.

the libellants from being considered as deserters, so as to forfeit their wages.*

I adjudge and decree, that the libellants have and receive their wages to the third of September, instant; and that the respondents pay the costs of this suit.

* See the case of Swift et al. *vs.* the Happy Return, ante page 253.

Charles Moran
versus
Alexander Baudin.

1788.

A French seaman claimed his wages from a ship which had changed her voyage from that for which he originally entered. The court decreed his wages.

THE libel in this case states, that Charles Moran the libellant entered as a mariner on board the ship L'Heureux at Nantz, in France, on the twenty-third day of October, 1786, under an engagement for a voyage from the said port of Nantz to New Orleans in the Mississippi, from thence to go to Martinique, and from thence to return to France. That Alexander Baudin the captain, had totally altered this voyage by repeated deviations, whereby the contract was broken, and thereupon the libellant prays a discharge and the amount of wages due.

The circumstances of this case appear from the testimony exhibited, to be as follows—

That this vessel sailed from Nantz the twenty-third of October 1786; that the mariners understood and were informed that this voyage was to be to New Orleans first, thence to the West Indies and thence back to Nantz or to some port of France, and that it would continue from 10 to 15 or 16 months, and under this expectation the mariners were registered at the proper office at Nantz, according to the manner of registering seamen in France. That instead of pursuing this voyage, as designated to them, they were taken three times to New Orleans, twice to Martinico, thence to Aux

Moran vs. Baudin.

Cayes, once to the Havannah and were now brought to Philadelphia. That in the course of these several voyages, the libellant and others of the crew made frequent complaints of the deviation from and prolongation of the originally intended voyage, and had applied to the intendants of some of the ports they were at, demanding to be discharged, or taken back to France, but were detained in the service of the ship by repeated assurances of the captain, that from the then next intended port they should be taken back to France. That in particular, when they were at Martinico the second time, the whole crew complained and demanded their discharge, whereupon the captain threw the boatswain and another sailor into prison, and that the boatswain wrote to the commanding officer of a frigate there, who sent for him on board, obliged the captain to pay him his wages and discharged him.

To this libel and testimony, the respondent hath urged in reply:

That no contract or articles between the captain and crew at Nantz hath been exhibited or proved; that the libel itself is deficient in form, and that, let the deviations from the original voyage be what they may, the libellant hath for his part justified the whole by signing a process verbal on board the ship on the 30th of April last, certifying that the ship L'Heureux had suffered damage by storm, and consenting to put into the port of Philadelphia in distress, which verbal process, so signed, was exhibited in court.

As there is no ordinance of the United States, or act of the legislature of Pennsylvania touching the present point, the claim of the libellant, who is

a French subject, and was shipped in France, will most properly be determined by the marine ordinances of the country to which he belongs, and under which he engaged in the service of this vessel. These ordinances strictly prohibit any captain or master of a vessel from receiving on board his ship any mariner, as such, who is not entered on his role d'equipage, made up in the commissary's office, or bureau de classes, of the port where the vessel shall be.* Now, as it has not been controverted but that the libellant has served on board this ship ever since she sailed from Nantz, it is in vain to call upon him for proof of the contract made at Nantz, since the role d'equipage, or a transcript of it, is in the captain's hands, and never in the mariner's. Had no such engagement taken place as mentioned in the libel, or should the libellant demand larger wages than had been agreed upon, the captain would have shewn the role d'equipage in proof against him. As he has not done this, although in his power, it follows that the allegation of the libellant must be admitted as true. Indeed it is in positive testimony that the libellant entered on board at Nantz, and was to receive 50 livres per month, wages; which is sufficient proof of a contract.

Moran vs. Baudin.

The case of a French seaman to be determined by the marine law of France.

The next point is to consider the repeated deviations from the original voyage, and how far this should operate in releasing the mariner from his contract. To lay it down as a general rule that the least deviation from a designated voyage, should invalidate the articles and discharge the mariners in

What deviation from the original voyage will justify mariners in demanding their discharge.

* See Ord. de Marine, vol. i, p. 422, and 715.

Moran vs. Baudin.

a foreign port, would perhaps be construing shipping articles too strictly, and certainly very injurious to commerce. Shipping articles are not to be construed by the same rules with a policy of insurance, their object and ground of reason being quite different. Yet gross and unnecessary deviation shall free a mariner from his contract: but there is no occasion to fix a general rule now—this cause is to be determined by the positive laws of France, and there is an ordinance express to the purpose.

* "If at any time after the arrival and discharge of the vessel at the port of her destination, the captain or master, instead of returning, shall freight or load his ship to go elsewhere, the mariner may leave her if he chuses, unless it has been otherwise determined by his special engagement." And this rule is further enforced by Valin's commentary on the article.

There appears to me a strong presumption that the boatswain who was paid off and discharged at Martinico by order of the commander of a frigate there, claimed the benefit of this ordinance. It is said, indeed, that his mother was dead, and he had business in France: but this, I think, would hardly be admitted as a sufficient reason to discharge a mariner in the midst of a voyage. Such as it was, it is plain that captain Baudin did not deem it sufficient, for he put the man in prison for demanding his wages and claiming his discharge.

The objections to the libel in point of form are not sufficient to exclude this cause from the notice of the court. It is indeed, not so precise as might

* Mar. Ord. vol. i, p. 548, art. iv. See Appendix, page xiv.

Moran vs. Baudin.

be wished, but the substance of the complaint is alleged, *viz.* An engagement for a certain voyage, frequent deviations from the voyage proposed, and a citation prayed for, to shew cause why the wages accrued should not be paid, and the libellant discharged.

The verbal process signed by the libellant on board the ship is the next circumstance relied on by the respondent; but this, I think, cannot have the operation expected. If the ship was really in distress as declared, there is no doubt but any mariner would sign his consent to put into a strange port, to avoid impending danger and refit the damaged rigging. But this deviation, occasioned, as it should seem, by necessity, cannot be deemed a justification of former deviations, where no such necessity appears, or is even pretended.

I am clearly of opinion, that if this cause was tried before a French court of justice, the libellant could not be refused the benefit of the marine ordinances of Frace, so expressly in favour of his claim. Therefore,

I adjudge and decree, that Charles Moran have and receive from the respondent in this cause, his wages at the rate of 50 livres per month, from the 23d of October 1786 to the date of the present libel, and that the respondent pay the costs of suit.

MARINERS' WAGES.

Rice et al.
versus
The Polly and Kitty,
James Eggleston, master.

1789.

The libellants, seamen of the Polly and Kitty, were obliged to leave her, during her voyage, in consequence of the cruelty of the master and mate. They returned to Philadelphia and claimed wages until they left the vessel. The court decreed payment to them. No demand was made for wages for the whole voyage.

THE libellants had been cruelly beaten and abused both by the captain and one Shirtliff the mate, during the voyage, particularly in the port of Lisbon, insomuch that on account of extreme ill-usage and dangerous threats, they were obliged to leave the brig at Lisbon in the midst of her voyage, and return to Philadelphia in another vessel; and the principal question was, whether this desertion did not incur a forfeiture of wages under the articles.

In giving judgment, after summing up the testimony, it was said—

When mariners enter into articles for a voyage, they do not thereby put themselves out of the protection of the laws, or subject their limbs and lives to the capricious passions of a master or his mate.

Master may inflict moderate chastisement on seamen.

On account of the great charge entrusted to the master, and for the benefit of commerce, the law holds his office in high estimation, and vests him with a great extent of discretionary power. It gives him absolute command over the seamen in all matters concerning their duty and the object of their service, but not an absolute command over their persons. The master has a right to correct a refractory, disobedient mariner: but wherever this

Rice et al. vs. the Polly and Kitty.

right is recognized in the books, *moderate* chastisement is always exprest or intended. For the law always watches the exercise of discretionary power with a jealous eye. The relation between a master and his servant or apprentice is such, that of necessity a discretionary authority is allowed by law to the master, yet nothing is more frequent than the intervention of the civil power to dissolve this connection, when the master is found to abuse his authority by undue severity and cruelty. Under such circumstances, the servant is justified in leaving his master.

Keeping a servant from meat and drink, or battery, are good causes for a departure from the service.[a]

The shipping articles, indeed, declare that forty-eight hours absence from the vessel, during the voyage, without leave, shall be deemed a total desertion, and incur a forfeiture of wages. But I would observe here, as I did lately upon another occasion, that although the sole contract mentioned in these articles on the part of the master or owner, is the payment of wages, yet law and reason will imply other obligations—such as, that the vessel shall be sea-worthy and properly fitted for navigation—that the mariners shall be supplied with sufficient meat and drink, and that they shall be treated with, at least, decent humanity.

From a general review of the testimony, and indeed from the mate's own account, it is manifest that the libellants have been cruelly beaten and abused on board this brig at sundry times, and es-

[a] Fitz. Nat. Brev. 391. 1 Black. 428.

Rice et al. vs. the Polly and Kitty.

pecially in the port of Lisbon, where the captain found it necessary to take one of them on shore and put him under the care of a surgeon to be cured of the wounds and bruises he had suffered under the chastisement given him by the captain and his mate.

The only justifications alleged for this great severity, are a general charge against the mariners of disobedience and insufficiency in their duty, without specifying any particulars, and an appearance of a mutinous combination between them in the port of Lisbon. I have carefully considered the testimony with regard to this last suggestion, but cannot find sufficient grounds to support the charge. The words "*we shall see who will be master of this brig*," seem to have a natural reference to the request the mariners had just before made to him to be master of his own vessel, and not to suffer the mate to tyrannize over them in the manner he had done. As to the assertion that Hughes attempted to strike the mate, and that Lamant actually did strike him, it is not supported by testimony sufficient to establish a charge so highly criminal.

But what I principally look to, is the general conduct of the mariners on this occasion. Finding themselves so cruelly treated by the mate, they first made their complaint to the captain; instead of obtaining the redress they expected, the captain joined the mate in punishing them still more severely for making this complaint. This extreme severity, together with the declaration of the mate, that *he would make them glad to jump overboard before they got to America*, seems to have taken away all hope of redress or even safety on board,

and the whole crew left the vessel. When on shore, they did not secrete themselves, but frequently sought for and met the captain, and openly demanded their wages and clothes; and finally, they applied to the legal authority at Lisbon, and obtained a process against the captain. This conduct on the part of the mariners, seems to remove every appearance of an intended mutiny or a voluntary desertion. If the suspicion of either had been well-founded, why did not the captain apply to the courts of law at Lisbon, to have them secured and tried for their offences. This he did not do, but on the contrary, promised to pay them their wages, and anxiously avoided the process they had taken out against him.

Rice et al. vs. the Polly and Kitty.

It is not necessary to enquire what effect the captain's promise to pay the mariners their wages, after they had left the vessel might have, as a legal assumption, after the supposed forfeiture, because I find very sufficient grounds for determining the cause without it.

The libellants have not voluntarily deserted, but have been forced from a service in which neither the rights of humanity nor personal safety could be depended upon or even expected.

I adjudge that the libellants have and receive their wages to the time of their leaving the vessel at Lisbon (for this is all the libellants ask for),* and that the respondent pay the costs of suit.

* The claims of seamen to wages, under circumstances similar to those mentioned in this case, for the *whole voyage*, have been frequently allowed in the district court by judge Peters, and there are many cases in the English books, in which the principles on which such claims are founded, have been recognized.

SALVAGE AND MARINERS' WAGES.

Benjamin Weeks,
versus
Certain goods and rigging saved of the snow Catharina Maria. } Salvage.

and

Jurgen Jurgenson
versus
The snow Catharina Maria. } Mariners' wages.

1799.

Claim of salvage on goods preserved from a wreck at sea. Mariners of the vessel shipwrecked claim wages to the time of their arrival at Philadelphia. The wages claimed, out of the goods taken from the wreck, which the mariners assisted in saving.

TWO libels have been filed in the case of the snow Catharina Maria. The one claiming a reasonable salvage for goods preserved from a wreck at sea, and the other suing for mariners' wages; the voyage having been finished by the sinking of the vessel. The circumstances of the case appear to be as follows.—

The snow Catharina Maria, Peter Moller, captain, being on her return voyage from St. Croix, to Copenhagen, was on the twenty-first of September last, overtaken with heavy storms, in which she suffered so long and so much, that on the eighth of October, she became a mere wreck, and no hope of safety was left. In this extremity captain Benjamin Weeks, belonging to and bound for Philadelphia, came up with the distressed ship, and received the Catharina's crew on board his vessel.

The wind, however, soon after moderated, so that captain Weeks was enabled by the assistance of his own crew to take from the wreck 6 pipes,

and an ullage of Madeira wine, 6 cases of the like wine, 12 bales of cotton, and sundry articles of rigging, after which the Catharina Maria sunk and was lost.

Weeks et al. v. the Catharina Maria.

The first object is, to ascertain what reasonable salvage should be allowed to captain Weeks on the goods and materials thus saved and brought into port; and secondly, what wages the mariners of the lost vessel are entitled to, on this unfortunate conclusion of their voyage.

As to the first, *salvage* is an allowance made by the consent of all nations and all laws, for saving a ship or goods from the danger of the seas, from fire, pirates or enemies.[a] The quantum, however, of this allowance cannot, from its own nature, be fixed by any maritime rule or statute; because the reason of the law must be governed by the circumstances of the case, which will be various, according to the hazard, trouble and expense of the salvage. "If only the ship perishes, and the goods are saved, in that case, the goods ought to pay a proportion of a fifth or tenth penny, according to the easy or difficult winning or saving of the said goods."[b] So that the hazard or trouble should be the rule of salvage.

In regulating the discretion of the courts in such cases, oppressive salvage, such as may accumulate distress on the unfortunate, should be avoided on the one part, and on the other a generous allowance

[a] Lex. Rhod. 46. Lex. Mercat. 146. Park on Insurance, 147. Westket, 488. and other authors on the subject.

[b] Molloy, book 2, ch. v, sec. 4. Lex. Oler. ch. 4.

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By these principles I have considered the circumstances of the present case, and finding by the testimony, that the salvage has not been attended with any extraordinary hazard or difficulty, I adjudge to captain Benjamin Weeks, one-third part of the goods and materials saved from the wreck of the Catharina Maria, free of all legal costs or charges whatever.

As to the mariners' wages, it is a general rule of law, that if the ship perishes the mariner loses his wages: because, if they are allowed their wages, their best endeavours may be wanting to preserve the ship. But this seems to be rather a rule of policy than of natural justice; and is generally restricted to cases of a total loss, and before any port of delivery hath been attained. For if any of the goods have been saved and delivered in a place of safety, the mariners do not lose their wages for the whole voyage.[a]

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I adjudge, that the libellants have and receive their wages according to the ship's articles to the twenty-eighth day of October last, at which time, the remains of the wrecked cargo and rigging were delivered into the custody of the marshal of this court.*

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On the morning of the twentieth, the court met according to adjournment, when the marshal made return of the citation, certifying that the same had been duly served. The marshal's deputy at the same time informed the court, that he had first waited on Mr. Hellsteadt, the Swedish consul resident here, and informed him that he was going to serve the citation upon captain Holmstedt, and shewed the copy of the writ; after which he went on board and presented it to the captain, who absolutely refused to receive it, saying, in an angry manner, *that he was on Swedish ground:* that he then left the citation on the binnacle, and came away.

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Soon after this Mr. Hellsteadt the consul came into court, and after making some apology for the captain's behaviour, on account of his not understanding the English language, said, that by the laws of Sweden, the captain is vested with supreme command over his crew, who has a right to punish them according to his own discretion, to any extent, short of murder, or breaking of limbs; and that he neither is, nor can be, answerable to any foreign jurisdiction whatever for the exercise of this power; being accountable to the Swedish courts of judicature alone, on the return of the ship; that it was the captain's *duty* to refuse obedience to the citation issued from this court, or to do any thing that should seem to acknowledge its jurisdiction in a question between him and any of his crew; and that by the treaty between the United States and

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but that he was firm in asserting the rights and authority of this court in the matter now before it.

Punishment for the contempt.

Judgment. That Jonas Holmstedt has been guilty of a contempt, in refusing to obey the process of the court, and in confining in irons a suitor whilst under the protection of the laws, and applying for the justice of the country. For which offence I award that he pay a fine of *twenty dollars*, with the costs of prosecution, and stand committed until this sentence is complied with."

On the twenty-fifth, the court met on the business of the libel. Mr. Collin, the Swedish minister, presented a letter to the judge, signed Jonas Holmstedt, in which he says, that he is willing to answer any questions respecting the prosecution of this libel that may be asked, but cannot enter into any defence of his cause, as this would be a violation of the laws of Sweden, which he is, on his allegiance bound to obey. And then quotes a passage from the Swedish maritime law, directing that "if any disputes on the sea or on shore should arise between the captain and his crew, the parties are not permitted to sue for redress in a place subject to a foreign government," &c. &c. But these letters were not noticed, inasmuch as they uniformly expressed a denial of the jurisdiction of the court.

Swedish mariners not permitted by the law of Sweden to sue in the courts of foreign nations.

Mr. Soderstrom, the Swedish consul, resident in Boston, being here, addressed the court and said: —That he was very sorry he had not sooner heard of this disagreeable business, which he would have endeavoured to prevent by all the means in his power. That he could not justify the conduct of captain Holmstedt with respect to contempt, but as judgment had already past, the error was irre-

trievable: as to the libel now depending, he prayed the judge to indulge him with a little time whilst he endeavoured to accommodate matters between the parties, by proposing that the libellants should be discharged from the brig St. Oloff, and put on board some other vessel bound for Sweden, and that the wages due to them should be paid over to him (Mr. Soderstrom), in trust for the mariners, until the dispute might be determined in Sweden by a court of that country. The judge approving of this proposal, the court adjourned till further notice. Weiberg et al. vs. the St. Oloff.

On the twenty-seventh, Mr. Bankson received a letter from the Rev. Mr. Collin, informing that the proposed accommodation had proved unsuccessful, as consul Hellsteadt, "after the unlimited protest he had before made, could not permit the seamen to be received on board of any other vessel."

The cause then proceeded in course; the witnesses were examined, and the testimony reduced to writing.

On the twenty-ninth, a further progress was made in the cause, and some points of form adjusted.

And on the thirtieth, after proclamation made, the judge gave his final decree, in these words:—

I have duly considered the libel filed in this cause, and have heard and carefully attended to the testimony of the witnesses produced respecting the same; and I find, that the libellants entered on board the brig St. Oloff, Jonas Holmstedt, master, in December 1789, in the port of Cadiz, in the kingdom of Spain; that no articles or written con- Decision of the court.

Weeks et al. vs. the Catharina Maria.

should be the reward of those who exert themselves in the cause of humanity.

One-third of the goods saved allowed as salvage.

By these principles I have considered the circumstances of the present case, and finding by the testimony, that the salvage has not been attended with any extraordinary hazard or difficulty, I adjudge to captain Benjamin Weeks, one-third part of the goods and materials saved from the wreck of the Catharina Maria, free of all legal costs or charges whatever.

As to the mariners' wages, it is a general rule of law, that if the ship perishes the mariner loses his wages: because, if they are allowed their wages, their best endeavours may be wanting to preserve the ship. But this seems to be rather a rule of policy than of natural justice; and is generally restricted to cases of a total loss, and before any port of delivery hath been attained. For if any of the goods have been saved and delivered in a place of safety, the mariners do not lose their wages for the whole voyage.[a]

Mariners entitled to wages when goods have been saved and brought into port.

However doubtful the law may be, with respect to the mariners' wages in cases of a total loss of ship and cargo, there can be none, when a considerable part of the goods have been brought into port, and delivered up to a competent authority to take charge of them. So long as the duty of the mariners calls for their attentions and services in the preservation of the ship or cargo, or of any part thereof, so long does their lien for wages inure, in proportion at least to the value of the property so saved.

[a] 1 Ray. 739. Keble, 831. Park, 592.

I adjudge, that the libellants have and receive their wages according to the ship's articles to the twenty-eighth day of October last, at which time, the remains of the wrecked cargo and rigging were delivered into the custody of the marshal of this court.*

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The complaint states, that the libellants had entered on board this vessel about the twenty-seventh day of December in the year 1789, at Cadiz, in the kingdom of Spain, on a voyage from thence to Philadelphia and back again to Cadiz; for the wages of five Spanish milled dollars per month. That the captain had, during the voyage, and since her arrival in this port, treated the libellants with uncommon cruelty, insomuch that it was dangerous for them to remain any longer in his employ: that application had been made in their behalf to Mr. Hellsteadt, the Swedish consul, resident in Philadelphia, who refused to grant them any redress. Whereupon, they pray that their wages may be paid, and themselves be discharged from any further continuance on board the said brig.

In consequence of this libel, a citation was issued calling upon Jonas Holmstedt and all persons

concerned, to appear and make their objections, if any they have, why a decree should not pass according to the prayer of the libellants. Weiberg et al. ve. the St. Oloff.

On the morning of the twentieth, the court met according to adjournment, when the marshal made return of the citation, certifying that the same had been duly served. The marshal's deputy at the same time informed the court, that he had first waited on Mr. Hellsteadt, the Swedish consul resident here, and informed him that he was going to serve the citation upon captain Holmstedt, and shewed the copy of the writ; after which he went on board and presented it to the captain, who absolutely refused to receive it, saying, in an angry manner, *that he was on Swedish ground:* that he then left the citation on the binnacle, and came away. Refusal by the master to submit to the jurisdiction of the court.

Soon after this Mr. Hellsteadt the consul came into court, and after making some apology for the captain's behaviour, on account of his not understanding the English language, said, that by the laws of Sweden, the captain is vested with supreme command over his crew, who has a right to punish them according to his own discretion, to any extent, short of murder, or breaking of limbs; and that he neither is, nor can be, answerable to any foreign jurisdiction whatever for the exercise of this power; being accountable to the Swedish courts of judicature alone, on the return of the ship; that it was the captain's *duty* to refuse obedience to the citation issued from this court, or to do any thing that should seem to acknowledge its jurisdiction in a question between him and any of his crew; and that by the treaty between the United States and Laws of Sweden give the captain a supreme power over his crew, and he is accountable for his abuse of this power to the tribunals of his country only.

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Errick Weiberg one of the libellants, then applied to the judge, suggesting that he was apprehensive of ill-usage if he should remain in the power of the captain. But the judge directed him to continue his duty on board; telling him, that he was under the protection of the court, and believed there was no danger of the captain's using him ill.

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Errick Weiberg one of the libellants, then applied to the judge, suggesting that he was apprehensive of ill-usage if he should remain in the power of the captain. But the judge directed him to continue his duty on board; telling him, that he was under the protection of the court, and believed there was no danger of the captain's using him ill.

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After examining the testimony with respect to captain Holmstedt's conduct, Mr. Lewis, Mr. Bankson, and Mr. Sergeant, united in opinion, that the treaty with Sweden, as to the point in question, could not be so explained as to give the captain the exclusive jurisdiction he claims. That the words "*the most favoured nation*," used in the treaty with Sweden, are the words used in all the treaties between the United States and foreign nations in amity with them, and were never interpreted to found a jurisdiction exclusive of, or inconsistent with, the laws of the United States in our own ports. That such a right was never pretended in constructions of the general treaty with France; but that for vesting such a jurisdiction, a special convention was thought necessary, the terms of which have been specifically designated, and not left to inferences, or general construction.

That as the captain's conduct, in the instance before the court, could not be supported by his exposition of the treaty, neither could he be justified

in refusing obedience to the process of the court. And that this, together with the cruel treatment of the libellant, whilst under the protection of the court, was, and ought to be, deemed a *contempt.* Adding, however, that some allowance might reasonably be made, in alleviation, for the captain's being unacquainted with the language, and ignorant of the laws and customs of our country.

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The judge having attended to these arguments, observed, that the admitting a jurisdiction exclusive of the laws of the United States, was a matter of too serious import to be rested on implication alone. That the words referred to in the treaty with Sweden could not by any construction be supposed to embrace all the objects comprehended in the special convention made with France. That let the question of jurisdiction be what it may, there could be no necessity for the contempt, which captain Holmstedt had thrown upon the court, or of the violence with which the mariner had been treated. That a citation was the most moderate and unexceptionable process known, for bringing a matter before the court; after which, any plea to the jurisdiction might have been discussed, and would have been considered; but that his unprecedented conduct violated not only the rules of law, but even of common decorum. That he could not consistently with his duty, but consider the absolute refusal of answering to the citation, and the subsequent treatment of the libellant, whilst under the protection of the court, *as a contempt*, which ought not to pass unnoticed. That as to the amount of any fine that might be laid on this occasion, he was willing to give the apology that had been made its full weight,

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Benjamin Weeks,
versus
Certain goods and rigging saved of the snow Catharina Maria. } Salvage.

and

Jurgen Jurgenson
versus
The snow Catharina Maria. } Mariners' wages.

1799.

Claim of salvage on goods preserved from a wreck at sea. Mariners of the vessel shipwrecked claim wages to the time of their arrival at Philadelphia. The wages claimed, out of the goods taken from the wreck, which the mariners assisted in saving.

TWO libels have been filed in the case of the snow Catharina Maria. The one claiming a reasonable salvage for goods preserved from a wreck at sea, and the other suing for mariners' wages; the voyage having been finished by the sinking of the vessel. The circumstances of the case appear to be as follows.—

The snow Catharina Maria, Peter Moller, captain, being on her return voyage from St. Croix, to Copenhagen, was on the twenty-first of September last, overtaken with heavy storms, in which she suffered so long and so much, that on the eighth of October, she became a mere wreck, and no hope of safety was left. In this extremity captain Benjamin Weeks, belonging to and bound for Philadelphia, came up with the distressed ship, and received the Catharina's crew on board his vessel.

The wind, however, soon after moderated, so that captain Weeks was enabled by the assistance of his own crew to take from the wreck 6 pipes,

and an ullage of Madeira wine, 6 cases of the like wine, 12 bales of cotton, and sundry articles of rigging, after which the Catharina Maria sunk and was lost.

Weeks et al. v. the Catharina Maria.

The first object is, to ascertain what reasonable salvage should be allowed to captain Weeks on the goods and materials thus saved and brought into port; and secondly, what wages the mariners of the lost vessel are entitled to, on this unfortunate conclusion of their voyage.

As to the first, *salvage* is an allowance made by the consent of all nations and all laws, for saving a ship or goods from the danger of the seas, from fire, pirates or enemies.[a] The quantum, however, of this allowance cannot, from its own nature, be fixed by any maritime rule or statute; because the reason of the law must be governed by the circumstances of the case, which will be various, according to the hazard, trouble and expense of the salvage. "If only the ship perishes, and the goods are saved, in that case, the goods ought to pay a proportion of a fifth or tenth penny, according to the easy or difficult winning or saving of the said goods."[b] So that the hazard or trouble should be the rule of salvage.

In regulating the discretion of the courts in such cases, oppressive salvage, such as may accumulate distress on the unfortunate, should be avoided on the one part, and on the other a generous allowance

[a] Lex. Rhod. 46. Lex. Mercat. 146. Park on Insurance, 147. Westket, 488. and other authors on the subject.

[b] Molloy, book 2, ch. v, sec. 4. Lex. Oler. ch. 4.

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should be the reward of those who exert themselves in the cause of humanity.

By these principles I have considered the circumstances of the present case, and finding by the testimony, that the salvage has not been attended with any extraordinary hazard or difficulty, I adjudge to captain Benjamin Weeks, one-third part of the goods and materials saved from the wreck of the Catharina Maria, free of all legal costs or charges whatever.

One-third of the goods saved allowed as salvage.

As to the mariners' wages, it is a general rule of law, that if the ship perishes the mariner loses his wages: because, if they are allowed their wages, their best endeavours may be wanting to preserve the ship. But this seems to be rather a rule of policy than of natural justice; and is generally restricted to cases of a total loss, and before any port of delivery hath been attained. For if any of the goods have been saved and delivered in a place of safety, the mariners do not lose their wages for the whole voyage.[a]

Mariners entitled to wages when goods have been saved and brought into port.

However doubtful the law may be, with respect to the mariners' wages in cases of a total loss of ship and cargo, there can be none, when a considerable part of the goods have been brought into port, and delivered up to a competent authority to take charge of them. So long as the duty of the mariners calls for their attentions and services in the preservation of the ship or cargo, or of any part thereof, so long does their lien for wages inure, in proportion at least to the value of the property so saved.

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I adjudge, that the libellants have and receive their wages according to the ship's articles to the twenty-eighth day of October last, at which time, the remains of the wrecked cargo and rigging were delivered into the custody of the marshal of this court.*

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The court was thereupon adjourned for an hour to meet at the State House, the court having hitherto sat at the admiralty office. The attorney of the United States for the district of Pennsylvania, was called upon for his opinion, who attended, together with several gentlemen of the bar, and also some Swedish gentlemen, and others who had heard of the matter.

After examining the testimony with respect to captain Holmstedt's conduct, Mr. Lewis, Mr. Bankson, and Mr. Sergeant, united in opinion, that the treaty with Sweden, as to the point in question, could not be so explained as to give the captain the exclusive jurisdiction he claims. That the words "*the most favoured nation*," used in the treaty with Sweden, are the words used in all the treaties between the United States and foreign nations in amity with them, and were never interpreted to found a jurisdiction exclusive of, or inconsistent with, the laws of the United States in our own ports. That such a right was never pretended in constructions of the general treaty with France; but that for vesting such a jurisdiction, a special convention was thought necessary, the terms of which have been specifically designated, and not left to inferences, or general construction.

That as the captain's conduct, in the instance before the court, could not be supported by his exposition of the treaty, neither could he be justified

in refusing obedience to the process of the court. And that this, together with the cruel treatment of the libellant, whilst under the protection of the court, was, and ought to be, deemed a *contempt.* Adding, however, that some allowance might reasonably be made, in alleviation, for the captain's being unacquainted with the language, and ignorant of the laws and customs of our country.

Weiberg et al. ov. the St. Oloff.

The judge having attended to these arguments, observed, that the admitting a jurisdiction exclusive of the laws of the United States, was a matter of too serious import to be rested on implication alone. That the words referred to in the treaty with Sweden could not by any construction be supposed to embrace all the objects comprehended in the special convention made with France. That let the question of jurisdiction be what it may, there could be no necessity for the contempt, which captain Holmstedt had thrown upon the court, or of the violence with which the mariner had been treated. That a citation was the most moderate and unexceptionable process known, for bringing a matter before the court; after which, any plea to the jurisdiction might have been discussed, and would have been considered; but that his unprecedented conduct violated not only the rules of law, but even of common decorum. That he could not consistently with his duty, but consider the absolute refusal of answering to the citation, and the subsequent treatment of the libellant, whilst under the protection of the court, *as a contempt,* which ought not to pass unnoticed. That as to the amount of any fine that might be laid on this occasion, he was willing to give the apology that had been made its full weight,

Conduct of the master of the St. Oloff a contempt of court.

Weiberg et al. vs. the St. Oloff.

Punishment for the contempt.

but that he was firm in asserting the rights and authority of this court in the matter now before it.

Judgment. That Jonas Holmstedt has been guilty of a contempt, in refusing to obey the process of the court, and in confining in irons a suitor whilst under the protection of the laws, and applying for the justice of the country. For which offence I award that he pay a fine of *twenty dollars*, with the costs of prosecution, and stand committed until this sentence is complied with."

On the twenty-fifth, the court met on the business of the libel. Mr. Collin, the Swedish minister, presented a letter to the judge, signed Jonas Holmstedt, in which he says, that he is willing to answer any questions respecting the prosecution of this libel that may be asked, but cannot enter into any defence of his cause, as this would be a violation of the laws of Sweden, which he is, on his allegiance bound to obey. And then quotes a passage from the Swedish maritime law, directing that "if any disputes on the sea or on shore should arise between the captain and his crew, the parties are not permitted to sue for redress in a place subject to a foreign government," &c. &c. But these letters were not noticed, inasmuch as they uniformly expressed a denial of the jurisdiction of the court.

Swedish mariners not permitted by the law of Sweden to sue in the courts of foreign nations.

Mr. Soderstrom, the Swedish consul, resident in Boston, being here, addressed the court and said: —That he was very sorry he had not sooner heard of this disagreeable business, which he would have endeavoured to prevent by all the means in his power. That he could not justify the conduct of captain Holmstedt with respect to contempt, but as judgment had already past, the error was irre-

trievable: as to the libel now depending, he prayed the judge to indulge him with a little time whilst he endeavoured to accommodate matters between the parties, by proposing that the libellants should be discharged from the brig St. Oloff, and put on board some other vessel bound for Sweden, and that the wages due to them should be paid over to him (Mr. Soderstrom), in trust for the mariners, until the dispute might be determined in Sweden by a court of that country. The judge approving of this proposal, the court adjourned till further notice. Weiberg et al. vs. the St. Oloff.

On the twenty-seventh, Mr. Bankson received a letter from the Rev. Mr. Collin, informing that the proposed accommodation had proved unsuccessful, as consul Hellsteadt, "after the unlimited protest he had before made, could not permit the seamen to be received on board of any other vessel."

The cause then proceeded in course; the witnesses were examined, and the testimony reduced to writing.

On the twenty-ninth, a further progress was made in the cause, and some points of form adjusted.

And on the thirtieth, after proclamation made, the judge gave his final decree, in these words:—

I have duly considered the libel filed in this cause, and have heard and carefully attended to the testimony of the witnesses produced respecting the same; and I find, that the libellants entered on board the brig St. Oloff, Jonas Holmstedt, master, in December 1789, in the port of Cadiz, in the kingdom of Spain; that no articles or written con- Decision of the court.

Weiberg et al. or. the St. Oloff.

tract whatever were presented to the libellants by the captain, or any other person, to engage them in the service of this vessel, or for any designated voyage, except that they were told by the captain that they were going to Philadelphia and back again to Cadiz, where they should be paid off, at the rate of five dollars per month, and there discharged. That after their arrival at Philadelphia, the captain, without any new agreement whatever, undertook another voyage to St. Andero in Spain and back again to the port of Philadelphia, with the libellants on board, where the vessel now is. It also appears that captain Holmstedt had treated the libellants with uncommon severity and cruelty, especially *Weiberg*, whom he had confined in jail six days in Philadelphia, before their sailing for St. Andero, and as soon as he was taken on board again, beat him and otherwise abused him, so that he lay three days disabled from doing any duty. That after their return to this port the last time, the libellants made application to a proctor of this court, to sue for the justice of the country in their behalf. That in prosecuting this business, they had been absent from the brig about three hours, and on their return to the vessel, the captain caused them both to be pinioned and confined; threatening them with a drawn cutlass and denouncing vengeance against them. And that afterwards, whilst this cause was before the court and during an adjournment thereof, the captain caused Weiberg, one of the libellants, to be laden with irons and chains, and confined on board the brig.

Under these circumstances, I am of opinion, First, that the deviation to the port of St. Andero

in Spain, was such an alteration of the voyage, as might justify the mariner in demanding his wages. And secondly, that captain Holmstedt's conduct with regard to the libellants, hath been so cruel and unwarrantable by the maritime law, as would of itself have dissolved the contract—The rights of humanity being superior to the specific laws and customs of any nation:

Weiberg et al. vs. the St. Oloff.

Deviation from the original voyage authorizes the demand for wages.

Whereupon, I adjudge and decree, that Errick Weiberg and Nicholas Casterius be discharged from any further services on board the brig St. Oloff; and that they have and receive the sum of eighty-six dollars and twenty cents, in full of the wages respectively due to them. That is to say, to Errick Weiberg the sum of fifty-three dollars and eighty-six and two-thirds cents, and to Nicholas Casterius the sum of thirty-two dollars and thirty-three and a third cents. And I do further decree, that the brig St. Oloff, with her tackle, apparel and furniture, or such parts thereof as may be necessary to satisfy this judgment, together with the charges and costs of suit, be sold by the marshal of this district, according to law and custom, for the purposes aforesaid.*

Seamen to receive their wages, and to be discharged.

* In the case of Willendson *vs.* the Försöket, vol. i, page 197, the practice of the court as to foreign seamen, is fully explained.

BREACH OF THE ST. DOMINGO LAW.

The United States
versus
The schooner Penelope and her cargo. } In the district court of the U. States, Penn. district.

1806.

Information against a vessel and cargo belonging to a British subject for a breach of the St Domingo law. The owner had been but thirteen days in the United States, and denied his being a *resident*, and within the meaning of this act.

THIS was an information filed by A. J. Dallas, esq. against the schooner Penelope and her cargo for a supposed breach of the first section of the act of Congress, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo." The facts of the case were these: Mr. Richard Wood, a native of Bermuda, and who had been established there for a great number of years, in partnership with Mr. Joseph Wood his brother, both British subjects, and owners of the sloop Penelope, had during the year 1805, placed his children at school in Philadelphia. Previous to this circumstance, Mr. R. Wood, had not been in the United States for many years. With a view to take his children back to Bermuda, and not contemplating any particular commercial enterprize, he came to Philadelphia, on board the Penelope, on the eighteenth day of May, 1806. He found, after his arrival, the law prohibiting intercourse between the United States and certain parts of St. Domingo, in force; and at the instance of some of his friends, and exclusively on his own account, the Penelope took on board a cargo calculated for the markets of the prohibited island. This cargo was purchased

by himself, and by Mr. Edward Russel, his brother-in-law, and paid for by Mr. Russel out of the funds of Joseph and Richard Wood. During his stay in Philadelphia, Mr. R. Wood remained at the house of Mr. Russel; and thirteen days after his arrival in Philadelphia, he sailed with his children for Bermuda, where he landed, and ordered the Penelope to Cape François. The Penelope entered Cape François under the American flag, in order, as it was said, to prevent her being interrupted by the British cruizers; but her British register was lodged at the custom-house there; and having disposed of her cargo, she received another on board, and returned to Philadelphia on the twenty-seventh day of August, 1806. She was immediately seized, and the present information was filed.

The cause was tried by a special jury, before the district court, on the 26th day of September. On the part of the claimants of the Penelope, it was said, that the only persons who were objects of the law prohibiting intercourse with St. Domingo, were citizens of the United States, or *residents* in the same; and that the short visit of Mr. R. Wood for the purpose before stated, and his short stay in Philadelphia, did not bring him within the meaning of the term "*resident.*"

Mr. Dallas (district attorney) in support of the information, considered, first, the facts; and second, the law.

First, *the facts.* The sloop Penelope sailed from Philadelphia, touched at Bermuda, and went to Cape François, after the non-intercourse act was notified at the custom-house; and returned directly from the Cape to Philadelphia. If, therefore, she

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was owned, or employed, in part, or in whole, by a person resident within the United States; the voyage was unlawful, and the vessel was forfeited. The evidence on the point of ownership and residence proves, that the sloop was in part the property of R. Wood, a British subject, who came in her from Bermuda to Philadelphia, where he remained for several days; that while he was here, he shipped a cargo, through the medium of American merchants; that he returned in her to Bermuda (Capt. Dunscomb commanding her both when she sailed from and returned to Philadelphia), and then sent her on, with the cargo, to the Cape; that by the custom-house papers of the Cape she was described as "the American sloop Penelope of Philadelphia, Capt. Hatchet;" and that, consequently, for the purposes of the voyage, she had changed her ownership, her captain, and her flag.

Second, *the law*. From these facts it was urged, that the case came clearly within the pre-existing mischief of a trade, between the United States and the rebellious parts of the island of St. Domingo, which the legislature meant to suppress; that it was within the scope of the particular remedy provided, as well as within the general spirit and policy of the law. That Wood, who owned and employed the sloop, in the voyage to Hayti, was resident, in fact, within the United States, at the time of her departure from Philadelphia, cannot be denied; but, it is contended, that *a resident* within the meaning of the act of congress, applies not to occasional, and transient visitors, but only to permanent, domiciliated inhabitants of the United States. In refutation of this defence, however, it was endeavoured to fix upon

a contrary ground, the legislative sense, as well by a review of the mischief declared, the remedy provided, and the object of the law, as by the consequences of the claimant's doctrine; the provisions contained in acts of congress, *in pari materia*, particularly in the non-intercourse acts of 1798, 1799, and 1800,[a] and the legislative use of the word "resident," upon analogous subjects.[b]

Mr. James S. Smith for the claimants.—The present case is important not only on account of the value of the property seized, but because it is the first in which an act materially affecting the mercantile interest has received a judicial examination. Yet it lies within a narrow compass, and turns upon a single point, *viz.* was the Penelope "owned, hired or employed," &c. by any person *resident* within the United States.

In discussing this point it is proper to enquire—

1. What constitutes a residence, or who is meant by the term "resident."

2. Was the Penelope "owned, &c. by any person resident within the United States."

The word "resident" is defined by Dr. Johnson "Dwelling or having abode in any place."—Johnson's Dict.

It will not be contended on the part of the United States, that Philadelphia was Mr. Wood's dwelling place; yet, according to Johnson, dwelling

[a] Vol. iv, p. 129, § 1, 2, 3, 5. Ibid. p. 244, § 1, 2, 3. Vol. v, p. 15, § 1, 2.

[b] Vol. ii, p. 132, § 2, 3, 5. Ibid. p. 142, §. 11, 17. Vol. iii, p. 163, § 1, 2. Vol. iv. 134.

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place and place of residence are synonymous. Johnson's Dict. "dwell" "dwelling" "dwelling place."

So too, "inhabitant" and "resident" are synonymous.—Johnson's Dict.

Who is an inhabitant has been judicially decided. "A person coming hither occasionally as a captain of a ship, in the course of trade, cannot be called an inhabitant; nor does a person going from his settled habitation here, on occasional business to Boston, or elsewhere, cease to be an inhabitant."[a]

Being resident at a place, means then, having a family there, a home, transacting business there, and above all, its being the place to which, when absent from it, a man always proposes to return. Such is not only the strictly correct meaning, but also the common acceptation of the word.

What more common than the question, Where do you reside? what more absurd if resident means merely *being present.*

But "residence" is a term that has a definite legal meaning, established by numerous decisions. By an act of the legislature of Pennsylvania, freeholders are exempted from arrest except in certain cases, one of which is where they have not been *residents* in the state for the space of two years next before the issuing of the writ.

Yet the supreme court determined that a man who was in Georgia fifteen months previous to the issuing of the writ did not lose his privilege, because his family was here, and he meant to return.[b]

So too, in the case of a foreign attachment which can only issue where the defendant does not reside

[a] 1 Dal. Rep. 153. [b] 1 Dal. Rep. 241. 348.

within the state, the court refused to quash the attachment *only* because it did not sufficiently appear that the defendant intended to return.[a]

By the constitution of Pennsylvania, art. i, § 3. no person residing within any city, &c. which shall be entitled to a separate representation, shall be elected a member for any county.

Suppose the case of a merchant whose counting house is in the city, and dwelling house in the county; he spends a great proportion of his time in the city; and, therefore, if the district attorney's construction of the term resident is correct, is eligible. Nay, according to that construction, it would only be necessary that he should remain in the city on the day of election.

But admitting that the common acceptation of the word and its legal technical meaning are different, we must presume that congress meant to adopt the latter.

This is a highly penal statute; it subjects to forfeiture the property of innocent persons knowing nothing of the vessel having been at St. Domingo, which may be on board at the time of her return to the United States. It is, therefore, according to a well established rule, to be construed strictly.[b]

To discover the intention and construction of congress, statutes in *pari materia* have been referred to. Not one, however, has been cited that will support the construction contended for on the part of the United States. Wherever the intention of

[a] 1 Dal. Rep. 158. Similar case 2d New York Term. Rep. 318.

[b] 1 Black. Com. 88.

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congress clearly was to include persons actually within the United States, and not technically residing there, they have used other words in addition to that of resident.

The act to suspend the commercial intercourse with France,[a] is in general terms like the present. "No persons *resident*," &c.; and it has been asserted, that like it, it applied to all persons within the United States. Congress, however, when it was about to expire, instead of merely passing an act to continue it, passed one in more general terms, thereby shewing their construction of the former act.[b]

In that act we find the phraseology materially altered, "persons resident within the United States or *under their protection*," that is, persons actually within the United States, but who do not reside there.

The local or temporary allegiance which an alien owes to the government within whose territories he is, and the consequent protection of his person and property by that government, are alluded to in the phrase used. No term could have been more properly applied to aliens transiently within the United States.

It is said, however, that citizens of the United States resident in foreign countries were meant.—Not so: the next sentence provides for their case. The phraseology is again varied to apply to them:—"Citizens of the United States resident elsewhere."

a Laws of the United States, vol. iv. p. 129.

b Act of 27th Feb. 1800. 5 vol. 15.

That the phrase was intended to apply to persons who did not technically reside within the United States, appears also from the second section of the act, which allows a clearance to vessels owned, &c. by persons "*permanently* residing in Europe;" that is not merely those persons within the United States whose place of residence is Europe, but those who have not left it.

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The title of that act deserves to be noticed. It is as general as the title of the act upon which this information is founded, which has been referred to to support the construction contended for on the part of the United States. Both are entitled, acts "to suspend the commercial intercourse," &c. yet in both we find excepted cases in which an intercourse is allowed, and a clearance may be granted. The title, therefore, does not in the least explain the intention.

The act to prohibit the carrying on the slave trade,[a] makes a distinction between persons *coming into*, or *residing* within the United States.

The naturalization act[b] requires, that persons applying to become citizens shall prove that they have resided five years within the United States, and one year within the state in which they apply.

If "resident" means being personally present, those aliens who have been out of the state for one day during the year, could not be admitted.

Such, however, has not been the construction given to the act.—Mariners are daily naturalized. They are considered as residents because they have

[a] Act of 22d March, 1794, 3d vol. 22.

[b] Laws of the United States, vol. 6, p. 76.

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families within the United States, and always propose to return.

But waving further comparison with other acts, we assert that the intention of congress is apparent upon the face of the act itself.

Had they meant to prohibit all persons *within* the United States from trading to St. Domingo, they would have omitted the word *resident*, altogether. Their meaning then would have been clear, and much more forcibly expressed.

It is a rule in the construction of statutes that they are to be so construed, that, if possible, every word may stand and have a meaning.[a] This rule can be complied with in the present case only by adopting the construction contended for by the claimants.

It has been said, however, that the words "resident within the island of St. Domingo," are also used; that the same construction must be given to "resident" wherever it occurs; and that if our construction is adopted, a person resident within the United States may trade to St. Domingo with a person not domiciliated or legally resident there.

The same construction must undoubtedly be given to the term "resident" in both cases, but the consequence asserted will not follow.

Residents within the United States, are not only prohibited from having any commercial intercourse with persons resident within the island of St. Domingo, but their vessels are liable to forfeiture if they are carried, or destined to proceed to any *port* within that island.

[a] 1 Black. Com. 88.

The construction contended for on the part of the claimants renders the whole act intelligible and consistent, and therefore must be presumed to be correct. United States vs. the Penelope.

[Mr. Smith, in reply to the observations of the district attorney, commented upon the evidence to shew that only British funds were employed—that the claimants did not act in a clandestine manner, &c.]

Mr. Tilghman was about to proceed in the argument on the part of the claimants of the Penelope and cargo, when the jury mentioned that they had already made up their minds on the case. The court was requested to give a decided direction to the jury on the law, in order to afford an opportunity to either party to remove the cause to another tribunal.

Court. I do not think that this case, being one I have not had much time to consider, should be left to rest on my opinion. Although not one so well digested, as more deliberation would have enabled me to deliver, I shall give a direction sufficiently decided to afford an opportunity of taking an exception to it. My habit is not to leave points of law to the jury; it being the province and duty of the court to take on itself the responsibility for them, where time is afforded to form a deliberate opinion; which can seldom be done in the hurry of a trial in new and extraordinary cases.

In this case it is not necessary for you to embarrass yourselves (nor shall I set the example) with passing in review all the acts of congress alleged to be in *pari materia.* It is considered to be a proper course to pursue in argument by counsel,

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but it is a dangerous and unnecessary conduct for courts, to decide on a number of acts said to be in *pari materia*, when a question arises only on a construction of one. These acts may (as some of them have been) be brought before me for construction *directly*, and it would be unsafe to commit myself by an *incidental* opinion. Every law has something peculiar in its intention and object; the same words may on some subjects be of different import from that in which they are used on others. I often find one at a time an over match.

I join the counsel on both sides in recommending to you to divest yourselves of all political considerations and consequences. The only point is that of a *forfeiture*; and the only enquiry is whether the individual whose property is placed under your view, is of the description intended by the law to incur it. The facts are fairly and fully in proof. The arguments and suspicions adduced to suggest ideas of the investment of American capital, used for the outfit or lading of the vessel in question, are not conclusive, or grounded in proof: they are out of the case. A British subject, owning a British vessel, comes into a port of the United States with private views, to wit, to convey home his children, who had been placed here for education: having funds and commercial credit in our city, he was advised to use them in an enterprize inhibited to our own citizens, but, as he was taught to believe, not forbidden to aliens. On whatever ground he formed his opinion, he must take the risk attending it. Arguments of innocent, or mistaken intention, are to be used in applications for mitigations of forfeitures; but are here irrelevant. The power of

relieving from penalties, is in another department. He had the law before him, and must hazard the consequences of any act which produced an infraction of it. What were his *motives* is not, with us, so material, as what were his *actions*. It seems clearly proved that he did not come here to establish his *domicil*; but for a particular and transient purpose. There seems no disagreement about the general meaning of the words "*inhabitant and resident*," but it is said that the act of congress, under consideration, means any *personal residence*, while the business was in operation which incurs the forfeiture. A commorancy for the shortest time is held to be a *residence*, to bring the person within the act. The words are not "*residing or being*," but "*person resident*," throughout. Other acts of congress wherein the word, or words, are used, are brought to explain this; and yet they may, on examination, be found to be as deficient in perspicuity as this; which, on some future occasion, may be enlisted to explain *them*. Reasoning founded on the *pari materia* plan, is frequently a *petitio principii*, a begging question, or expounding one of unknown or doubtful expression, by another. The act produced to elucidate, is as little clear as the other. I recollect no direct judicial decisions on those acts, affecting the point now before us. It is true that persons "*being*" within our jurisdiction, owe allegiance as it respects *crimes*, for the commission whereof they are punishable. But this is an highly penal act, and must have a strict construction. Here is a *forfeiture* declared in the case of a person, not only actually "*being*," but one who must be described by the words "*any person or persons resi-*

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dent within the United States," to be included in its purview. Congress may have intended to comprehend one "residing or *being*." If *resident* means nothing but mere momentary commorance, where it is even coupled with "*being*," it might as well be left out. The question seems to be whether they inserted "*resident*" without the legal meaning generally affixed to it. If they have omitted to express their meaning, we cannot supply it. Our duty is to *expound*, and not to *make* acts of congress. In so penal a case what can we do better than to take the legal interpretation? That I may not mistake, I will read, from notes in other cases, what I have said on a similar point, over and over again. In the case of *Hilton and Brown* in the circuit court, and cases in this court, the following has always been my definition of the words "*resident*," or "*inhabitant*," which, in my view, mean the same thing.

Definition of "resident."

"An *inhabitant*, or *resident*, is a person coming into a place with an intention to establish his domicil, or permanent residence; and in consequence, *actually resides*: under this intention he takes a house, or lodgings, as one fixed and stationary, and opens a store, or takes any step preparatory to business, or in execution of this settled intention. The time is not so essential as the intent *executed*, by making or beginning the actual establishment, though it is abandoned, in a short or longer period."

A mere transitory coming for a special purpose, a mere transient visit, does not fall within the legal meaning of the word "*resident*." He must have the intent of staying, or abiding, for permanent purposes; and begin it, though he does not continue

to prosecute it. On the meaning, if doubts exist in common interpretation, we must be governed by the legal definition. The attorney of the district does not consider it a clear case, because he has taken great pains, and brought together a mass of interpretation for the purpose of affording opportunity for exception to my opinion, though I have had no time to consider it maturely: I say, that this claimant is not a "*resident*," or within the meaning of the act of congress on which the prosecution is founded. It is a case of great importance in its consequences, and ought to be well considered. Though I have thus directed you, this being a case partaking of crime, a *malum prohibitum*, though not morally criminal, you have, perhaps, a latitude both as to law and fact; and under all these circumstances, and with this opinion of the law, I leave you to decide according to your unbiassed judgments.

Verdict for the claimants.

Mr. Dallas for the United States, Mr. E. Tilghman, Mr. Smith, and the Reporter, for the owner of the Penelope and cargo.

No appeal was prosecuted in this case.

FORFEITURE OF A SHIP FOR BEING FALSELY REGISTERED.

The United States of America
versus
The ship Anthony Mangin,
T. W. Norman, claimant.

Libel grounded on the statute for enrolling ships & vessels.

1802.

The ship Anthony Mangin had been registered as an American vessel, when she belonged in part to a foreigner. She was afterwards sold for a valuable consideration to a person ignorant of the fraud which had been committed, and was afterwards libelled as forfeited to the United States.

Opinion of the honourable Judge Winchester.

THE proceeding being *in rem*, all the world become parties to the sentence, as far as the right of property is involved; and of course all persons in any wise interested in the property in question, are admissible to claim and defend their interests.

The libel states the cause of action with all the averments necessary to support the affirmative allegation that a forfeiture has accrued.*

* The United States of America,
Maryland district, ſs.

To the honourable JAMES WINCHESTER, *judge of the district court of the United States of America for Maryland district.*

IN the name and on the behalf of the United States of America, Zebulon Hollingsworth attorney of the United States for Maryland district, cometh here into court in his proper person, and giveth the court here to understand and be informed, that heretofore, *to wit*, on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and one, at the port of Baltimore, in Maryland district, a certain Aquila Brown, a citizen of the United States of America, and of the city of Baltimore, being a part owner of a certain ship, called

FORFEITURE OF A SHIP FOR BEING FALSELY REGISTERED.

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The only claimant intervening in this cause is T. W. Norman, who alleges himself to be a *bona fide* purchaser for a valuable consideration, ignorant of any cause of forfeiture existing at the time of the purchase; and under such purchase, *i. e. bona fide* and for a valuable consideration claiming the property as exonerated from the cause of forfeiture alleged, even if the facts stated to sustain the same be true, which he in no wise admits.

On these proceedings several questions of law have been raised and argued by the counsel; and as the great point does not appear to have ever received either in this country or in Great Britain any

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the Anthony Mangin, appeared before Robert Purviance, collector of the customs for the United States of America at the port of Baltimore, in Maryland district, he the said Robert Purviance being then and there the officer authorized by law to make registry of the said ship; and the said Aquila Brown then and there, *to wit*, on the day and year aforesaid, at the district aforesaid, made oath before the said Robert Purviance, on the Holy Evangelists of Almighty God, that he the said Aquila Brown was the sole owner of the said ship called the Anthony Mangin; the said oath being then and there made by the said Aquila Brown, and so as aforesaid administered by the said Robert Purviance collector as aforesaid, in order to the registry of the said ship; and with the intent to obtain, and for the purpose of obtaining, a register for the said ship, pursuant to the statute of the United States in such case made and provided. And the said attorney in the name and on behalf of the said United States, doth aver, and in fact say, that the said fact in the said oath alleged, that the said Aquila Brown was the sole owner of the said ship, called the Anthony Mangin, within the knowledge of the said Aquila Brown so swearing as aforesaid was not true, *to wit*, on the day and year aforesaid at the district aforesaid; but the said attorney in the name and on the behalf of the said United States, doth in fact aver and say, that

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direct judicial determination, I have with great diligence examined into the question, which from the breaking of the cause, I saw must necessarily be involved in the determination.

The opinion which I am now to give as the result of more than usual investigation, is delivered with the diffidence which will ever attend the determination of an inferior court upon a new, great and important legal question, and which will probably receive, as it ought, the ultimate judgment of the supreme court.

It is necessary to keep in different views the questions of fact in issue, the questions of law arising

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the said fact so alleged in the said oath was false and untrue; and that within the knowlege of the said Aquila Brown, a certain Harman Henry Hackeman, an alien and not a citizen of the United States of America, was part owner of the said ship called the Anthony Mangin, at the time of making the said oath by the said Aquila Brown as aforesaid, with the intent and for the purpose aforesaid, and in order to the registry of the said ship *to wit*, on the day and year aforesaid, at the district aforesaid; for which causes the said Robert Purviance collector as aforesaid, hath caused the said ship, her tackle, apparel and furniture to be seized as by law forfeited. Wherefore the said attorney prayeth the advice of the court here in the premises, and that due process of law may issue against the said ship, her tackle, apparel and furniture, and that due proclamation with monition may issue in this behalf to cite and admonish all persons to be and appear at a day and place by your honor to be named, to shew cause if any they have, why the said ship called the Anthony Mangin, her tackle, apparel and furniture should not be condemned and sold, and the money arising from said sale to be distributed according to law. And that she be so condemned and sold, and the said money so distributed prayeth

ZEB. HOLLINGSWORTH, *attorney of the United States for the Maryland district.*

from these facts, and the parties between whom they arise.

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It is to be distinctly remembered, that A. Brown whose wilful perjury is alleged to sustain the forfeiture sued for, is no party to the suit; neither are his assignees, in any shape *parties* to this suit to be directly affected by the judgment. Every consideration, therefore, which would be in support of a prosecution against the actual offender, to recover the penalty of his wilful crime, or which might be alleged against those who stand in his situation as privies in law *quoad* the forfeiture must be laid out of the case.

The only parties to this suit are the United States and the informant as libellants, and T. W. Norman as claimant of the ship. And I think it peculiarly necessary to confine my opinion to the state of facts, and questions of law, applying to the parties in court, because it is not necessary for me to decide whether the assignees of A. Brown are clothed with any of the essential characters of a fair purchaser, or have, so far as relates to the property, any privilege or exemption which Brown himself would not have had, and the question *de bona fide emptoris*, does arise directly upon captain Norman's claim.—To that I shall, therefore, immediately proceed.

No seizure was made or libel filed against the ship until *after* Brown's bankruptcy, and a sale by his assignees to the claimant, who is admitted to be an innocent purchaser for a valuable consideration. Nor until after he had obtained a new register in his own name upon that purchase.

It is argued by the libellants' council that Brown

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was not competent to pass any property to his assignees, nor they to any purchaser under them, as the forfeiture relates back to vest the property from the *time* of the false oath; and that the libellants' claim is therefore paramount to that of the claimant.

The defendant's council argue in support of his claim, that the relation back to the time of the offence is never admitted to overreach *rights* intermediately acquired by third persons.

In commenting on the case from 1 D & E 252, when the argument was first opened, Mr. Martin pressed very strongly the dictum of lord Kenyon, that if the relation back to the time of an offence, was admitted as to the property, it would in every case equally relate as to the profits intermediately acquired. If the reason assigned was true, it certainly furnished one of the strongest cases for applying the argument, *ab inconvenienti*, and as such I was forcibly struck with it when mentioned.

The manner in which lord Kenyon is reported to have made this observation, plainly shews it to have been the declaration of a sudden impression; and which, though correct as applied to some special cases, is not so in the latitude reported, either at common law, the civil law, or in equity, supported by policy. [a]1st. at common law, even as to the guilty party, no attainder whatsoever has relation as to the mesne profits of lands, but only from the time of the attainder. 2d. By the civil law, and the rules of equity adopted from that code, a subsequent possessor is not only in a worse situation than those from whom he derives his possession, but even in

[a] 3 Bac. 272. Co. Lit. 390[b]. 118[a].

cases where the original possessor might be bound to restore profits, a *bona fide* possessor is exempt from any obligation to restore such profits, as in the case of a *bona fide* purchaser, *bona fidei emptor, non dubie percipiendo fructus, etiam ex re aliena, interim suos faciat, non tantum eos qui ex diligentia, et opera ejus proveniunt sed omnes, quia quod ad fructum attinet loco domini est.*

3d. It would not be equitable or just, in the abstract, to permit a legal owner to lay by to avail himself of the ignorance of an innocent holder; and the same considerations of policy, which in England permits the offender and his family to enjoy the profits of lands forfeited for treason, which is a strong and acknowledged case of relation to the offence, lest land should be uncultivated, and the public interest thereby suffer, applies conclusively to every case where it may be doubtful whether the relation is to the offence, or only to the time of the conviction.[a]

As this reason against relation does not appear to have the force it carried at first view, we must have recourse, first, to the principles of decisions in analogous cases, in their application always having regard, as was justly argued by Mr. Harper (on the motion to produce Brown's examination before the commissioners) "that a relation back shall never be permitted to injure the *rights of third persons*, nor to *protect* or *favor wrong:* and secondly, to the statute under which the forfeiture is claimed in this case.

The adjudged cases on this subject are six classes of offences, which incur a forfeiture of real

[a] 2 Inst. 48. Hard. 87. 4 Com. dig. forf. b. 4.

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estate;[a] and seventeen which produce a forfeiture of personal property.[b] In this numerous classification the principle which governs each description of cases does not materially differ.

I have, therefore, only selected the cases of, and attainder of crimes, as illustrative of these cases.

Second. Waived goods.

Third. Relation of executions at common law,[c] and since the statute of Charles, and

Fourth. As involving the general doctrine of this case, and to explain the case cited by Mr. Harper,[d] from a case of villenage which governed that decision.

First. Attainder or conviction of crimes and outlawry. Of this description there are two classes, which are adjudged to have relation to the time of the *offence committed*, and over-reach all intermediate alienations, *treason* and *felo de se*. The case of treason in which the forfeiture relates, *as to land*, to the time of the offence committed, depend upon feudal principles; as the land could not be alienated by the tenant voluntarily, it would be preposterous to admit that to be done through the medium of a crime, which could not be done by a lawful act: and the power to sell introduced by subsequent statutes, is considered as applying only to lawful alienations.[e] The reason assigned in some books, that it shall relate to the offence, because "the indictment contains the year and day when it was done," is by no means true or satisfactory, since that would apply equally to personal property, which the

[a] 2 B. C. 267. [b] 2 B. C. 421. [c] 8 C. Bac. vol. ii, p. 318 [d] 5 Mod. 193. Salk. 223. S. C. Roberts *vs.* Wethered. 2 Bac. 318. [e] 5 Bac. 228. H. P. C. 261, 2.

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same books admit is only affected from the time of the conviction:[a] and the time charged is traversable even in the case of land by the third persons claiming an interest therein.[b]

It is a proposition universally true, that the forfeiture upon an attainder for treason, relates but to the conviction, as to chattels: unless the case of the offender killed in resisting, or flight, form an exemption, which may well be doubted.[c] Indeed, says Ld. Coke,[d] it hath always been holden that any one indicted or appealed of treason or felony, may *bona fide*, sell any of his chattels, real or personal.[e]

In the case of *a felo de se*, it is stated, that the forfeiture has relation to the time of the mortal wound given, so that all intermediate alienations are avoided.[f]

This is the only case I have ever discovered in which the doctrine of relation has been so far extended. If the principle of that determination is sound, and it is applicable to other cases, it is a drag-net indeed.

It may perhaps, most correctly be considered as a cause *sui generis*, and neither for the reasons which are assigned to maintain it, nor the doctrine it supports, applicable to other cases.

Those who are curious on this subject will be amused with the argument of chief justice Dyer on the drowning of Sir J. Hales, and will probably be as much convinced by the reasoning of the chief

[a] 3 Bac. 271. Plow. 488. 8 Co. 170. [b] Hale's H. P. C. 264, 70. 3 Inst. 230. [c] 3 Bac. 271. Perk. § 29. [d] 8 Rep. 171. [e] S. P. Skinner, 357. Jones *vs.* Ashurt. 4 Com. Dig. forfeiture. B. 4. 2 Inst. 48. [f] 3 Bac. 272.

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justice,[a] as by the logic of the grave-digger in Hamlet, to prove that the drowning of Ophelia was *se defendo*.

Outlawry subjects the party to forfeitures which, as are well known, depend upon the nature of the suit upon which they are prosecuted. Without enquiring when an office is necessary or may be dispensed with by the crown, I shall mention one[b] case, where even after an outlawry, (of which purchasers might always have notice as it is a matter of record) a fair purchaser was protected even against the crown: it is from Hardres, 101.[c] Attorney General *vs.* Freeman—A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands were found amongst others by inquisition, and this lease was pleaded in bar to bind the king, being before the inquisition: the court held that a lease or other estate, made by the party *after* outlawry and *before* an inquisition taken, will prevent the king's title, if it be made *bona fide* upon good consideration: but if it be made in trust for the party only, it will not be a bar; but that no conveyance whatsoever, made after the inquisition, will take away or discharge the king's title. These cases are strong to shew the general protection afforded by law to fair purchasers, even where the forfeiture is *in rem.* and the offender is not *actually* divested of his possession; the necessity of which is directly affirmed in the second description of cases to which I have alluded, to wit:

Second. Waived goods.

[a] Plow. 262. [b] 5 Bac. 564. [c] Sal. 395. Carth. 442.

As to waived goods, these belong to the king, and are in him without any office, for the property is in *nobody*. They may belong in like manner to the lord of a manor by *grant*, but not by *prescription*.

The general principle of these cases is conformable to that quoted by Mr. Harper[a] to shew that an offence like that charged against Brown, divested the property out of *him*, and left it, as it were, in *abeyance* until suit, which vested the property by relation, from the act of forfeiture. A position of greater comprehension, or which, as a general rule, should embrace the libellant's case, could scarcely be imagined. Waived goods are in the king *without office*, that is, even *without seizure*, the purpose of which is answered as to legal title to the king, by the office. The property is as it were in abeyance, yet this case, so completely applicable in its general principles contains "the strongest possible illustration of the doctrine that a title by forfeiture in the case of a personal chattel, begins from suit, seizure or conviction, and has no relation back,[c] for the owner may at any time retake the goods waived, if they are not seized by the king, or the lord of the manor; for the lord's property begins from the seizure."

This case is conclusive against Mr. Hollinsworth's argument, that the question is a question of property only, since it proves that property only begins *from the seizure*, which cannot be lawfully

[a] 5 Bac. 517. 5 Co. 109. [b] 12 Mod. 92. [c] 5 Bac. 517, cites, 21, 2, 4. Ed. 4, 16. 16 Kitchen, 82.

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made, to affect an intermediately vested right of a third person.

Third. The relation of executions, at common law, and since the statute, considering this case as one between the government and the claimant, from analogy to cases of the king's precedency in execution.

By the statute of 33 H. 8, c. 39, it is enacted, that if any suit be commenced or taken, or any process awarded, for the recovery of any of the king's debts, then the same suit or process shall be preferred before any person or persons.

[a] And as the king's execution of goods, the same relates to the time of awarding thereof, which is the test of the writ, as it was in the case of a common person at common law.

Now to apply the doctrine to the case before the court, and even admitting to this libel the same extent of relation, as is admitted at common law upon the king's execution against personal chattels, and as to real and personal, by the above recited statutes—will it over-reach the sale to Capt. Norman?[b] It is generally agreed that an execution *executed* though *posterior* to the time to which the king's extent *relates*, bars the king's priority; and in the case of Lechmen *vs.* Thorogood,[c] it was holden, that if the king's extent be sued out *posterior* to a judgment recovered by a subject, and a writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed, for the pro-

[a] 2 Bac. 73, 4, &c. [b] 2 Bac. 735. 3 Mod. 236. Com. C. 12, Z.

perty of the goods is changed by the subject's execution.

Here then we advance one step further in restricting the doctrine of relation, as it applies to individual interests. It is presumed that the principle of relation upon executions since the statute, is too familiar to require any reference to adjudged cases.

Fourth. The case of Roberts and Wetheral, as reported by Salkeld and copied by Bacon, is in these words. "By the act of navigation,[a] certain goods are prohibited to be imported here, under pain of forfeiting them, one part to the king, another to him or them that will inform, seize, or sue for the same.[b] It was adjudged that in this case, that the subject may bring detinue for such goods as the lord may have replevin, for the goods of his villein distrained, for the bringing of the action vests a property in the plaintiff.

When this cause was first referred to by Mr. Harper, I considered, as I believe he and the other counsel did, that it came nearer to the case before the court than any which occurred in their researches. On a careful examination of that case, I now think it will be found not to bear on the point now to be decided.

In the first place it may be observed, that the case as reported, does not afford any ground to presume, that any other person than he who had *unlawfully* imported the goods, was interested in the suit; but on the contrary, it is presumable that it was a suit against the *original* importer.

[a] 12 Ch. ii, cap. 18. [b] 2 Bac. Abr. 318. Salk. 223.

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In that case, the question of relation could not have arisen, since it was utterly unimportant to the plaintiff and to the defendant, whether the plaintiff recovered by a title which related to his writ, or to the time of the importation: and further, it is to be remarked, that the question in that case seems to have been only upon the form of action. It was detinue which was *founded upon property*, and all that that case decides is, that in a case of specific forfeiture, the bringing of the suit vests a property in the plaintiff sufficient to sustain the form of action; for the case to which it is likened and on which the decision rests, is express to shew it does not relate to the *interests of others;* for, says the book, "in this case the subject may bring detinue for such goods, *as the lord may have replevin for the goods of his villein.*" Which case, as I will shew, goes not only to the form of action, but to the full length of the case.[a]

So in this case, this ship was liable to forfeiture, and might have been specifically recovered from Brown by the government, or any prosecutor under its laws, before a *bona fide* alienation by him; but if they have waited until such alienation by him, and a third person has honestly bought and paid for the property sued for, they may be answered in the language of Littleton, "that it shall be adjudged their folly that they did not enter when the offender was in possession." For according to Coke, *before such seizure*, they had neither *jus in re*, nor *jus ad rem*, but only *a right to sue*, which I understand to

[a] See at full length, Littleton, S. 177, with Ld. Coke's comment thereon.

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be the meaning of lord Coke's *possibility* above referred to. From all these cases and principles, I infer that the relation of the forfeiture to the time of the offence in cases of treason and felony, especially by self-murder, is peculiar to those cases; that in case of forfeiture of chattels, the relation is only to the time of the conviction.

That the forfeiture to which a party is subjected by statute of a personal chattel, must be construed with relation to the *continuance of his ownership* in that chattel at the time of conviction, and cannot be prosecuted *in rem*, to affect a *bona fide* purchaser for a valuable consideration; and this construction I think not only warranted by the statute on which it is founded, and which speaks of a recovery of the *value* of the ship, but also by sound legal principles. The value can only be recovered against the *actual offender*, and never from a *bona fide* holder: for against the offender, it is the value at the time of the offence, even against a *mala fide* holder it is only of the thing, be the value of that thing greater or less. If any holder, *bona fide*, was liable because of his possession, he would not be the less so after he had parted with his possession, but he might be made answerable for the value of the thing in the same manner as if the possession had continued with him; but even where he was not, strictly, a *bona fide* holder, the remedy *in rem* is lost if his possession is gone. And it is but just when two remedies are given, to punish an offence, one of which shews a plain intent of the legislature that it shall follow the offender personally or in his personal interests, so to construe the other remedies, as not to permit them

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to be extended to involve others, who are wholly innocent, in the same degree of punishment as would attach to the responsible offender.

The argument, that Brown by his false swearing subjected the ship to forfeiture *de facto*, and that no alienation by him could vest a better title in the vendee than the vender possessed; and that as he held the ship subject to forfeiture, so any holder under or through him must take it subject to that forfeiture, is certainly a strong one.

The general principle is undoubtedly true, that a derivative title cannot be better than the original from which it is derived; but it is only true as a general principle, and the exceptions to its operation are those on which I rely, to warrant my construction of the statute in providing for a recovery of the *value* of the ship, as well as to shew that in some instances, he who hath no title at all may yet transfer a valid one to personal chattels.

Robbery can give no title to goods, and upon conviction there is a judgment of restitution, according to the statute which fixes the remedy against any person in *possession* at the *time* of conviction; and this is by the express provision of *positive law*.

Yet the owner of goods stolen, who has prosecuted the thief to conviction, cannot recover the value of his goods from a person who has purchased and sold them again, even *with notice* of the theft *before conviction*.[a] And if the owner of goods loses them by a *fraud* and not a *felony*, and afterwards convicts the offender, he is not entitled to

[a] 2 Term. Rep. 750.

restitution or to retain them against a third person, *e. g.* a pawn-broker, who has fairly acquired a new right of property in them.[a]

If, therefore, he who has no title at all may nevertheless, in some cases, give a legal right, *a fortiori*, he who holds by a title defeasible only within a limited time (for by the statute of limitations the prosecution, in cases like the present, must be within two years) may transfer a good title to a *fair* purchaser for *a valuable consideration.* The language of Blackstone is very emphatic: "The right of proprietors of personal chattels is preserved from being divested, only so far as is consistent with that other necessary policy, that purchasers *bona fide*, in a fair, open, and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.[b]

The statute provides that in case of a wilfully false oath, in any of the matters required previous to the obtaining the registry, "there shall be a forfeiture of the ship or vessel, together with her tackle, apparel and furniture, in respect to which the same shall have been made, or the value thereof to be recovered," &c.

It seems to me the plain and just construction of this statute that the wilful false swearing does not *ex directo* produce a forfeiture of the ship. The forfeiture is alternative either of the ship, or of the value of the ship; of *either* at the election of the government, or person suing, but not of *both* the ship and the value. If the government had recovered the value from Brown, there would have

[a] 5 Term. Rep. 175. [b] 2 Bl. Com. 449, 450.

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been an end of proceedings against the ship. And if the offence charged against Brown, only produces a specific forfeiture by a subsequent election, the argument is cogent that the relation consequent upon that election, should be restricted by the general rule, that it shall not overreach an antecedent equity, and conclusive that Brown's title was not forfeited *de facto*, but forfeitable only, and, therefore, within the principles of the cases of waived goods, and villenage before relied on by me, and expressly by Blackstone.[a]

Further, the forfeiture is of the ship *or* the value. I have construed this clause somewhat differently from all the counsel: and though this circumstance produces doubts of its correctness, yet as it has weight with me, and minds of less comprehension may sometimes embrace truths which escape superior understanding, I think it my duty to mention it. It is this—That the ship is not liable to forfeiture in the hands of any holder, other than the person false swearing *in any case* but where such holder would be liable to a suit for the value.

The words "that there shall be a forfeiture of the ship," &c. or of the value thereof, "to be recovered with costs of suit *of the person* by whom such oath or affirmation shall have been made," plainly shew the intent of the legislature, that the penalty and punishment should attach to the offender *only*. "To be recovered of the person," both grammatically and legally relate to the object to be recovered, *to wit*, the ship or the value thereof; and the person from *whom, and whom only, the one or the other is to be*

[a] 2 Black. Com. 421.

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recovered. The guilt of false swearing forfeits only such interests as the offender possessed; for by the express provision of the sixteenth section of this statute, the rights of an innocent and unoffending owner are exempt from forfeiture. And the words of the statute which connect the recovery with the forfeiture in this case, exclude the idea of any recovery from an innocent holder. *Expressio unius est exclusio alterius.* If the ship is forfeited by the sole act of the false swearing, then she is equally forfeited, notwithstanding there may have been fifty fair transfers in public market. Every particular sale would be a particular conversion: and any one, or every one, through whose hands she may have passed might be sued for the *value of the price*; but the statute says that value shall *only* be recovered of the offender himself. A party having fairly obtained, and fairly lost or departed with his possession, would not in such case be liable for the thing or its value.[a]

If not liable when his possession has *honestly ceased* neither can he be made so when it honestly continues since his own act cannot vary his legal responsibility.

Does reason or policy require a different construction? The government prohibits an act under a penalty against the party offending. They say we for this forfeit the thing in respect to which you have sworn falsely, if it continues in existence *and* is *yours;* but if lost or destroyed, or other persons innocently acquire new rights in that thing, your guilt shall still be punished; if annihilated—if sold —pay the value; if you have fraudulently impaired

[a] 3 Com. Dig. 359. 2 Term. Rep. 750.

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the thing, still pay *the value;* the *one* or the *other* shall be recovered of *you* of *you* the guilty party.—But this prohibition contains no threat of punishment against an innocent holder.

No inconvenience arises from this construction. A purchaser can only look to the face of the documents, to the records of title which the law requires for this species of property. The knowledge of the cause of forfeiture rests generally in the bosom of the offender; and the law can never require of a purchaser to examine into the secrets of the heart.

It is more the interest and policy of government to increase its wealth and strength by the employment of ships in trade and commerce, than to augment its revenue by forfeitures. It therefore wisely protects the interests of fair ship-holders, while it carefully provides for the punishment of *fraudulent contravention of its laws.*

Protection is not by this construction afforded to guilt or fraud, it is only a shield for innocence. The remedy remains, as it ought, against him who committed the offence. Government cannot be deprived of its forfeiture by any fraudulent alienation; such a sale would be void:[a] the possession is legally, and to effectuate the statutory provision still in the vender.[b]

Indeed all the reasoning on this subject is contained in two axioms of the civil law, to which this court may be allowed to refer. *In rem actione tenetur qui dolo desiit possidere.*[c] *Et aliquando quod fieri*

[a] Skinner 357, Jones *vs.* Ashurst.

[b] 3 Coke, Twines case. 2 Bl. Com. 421.

[c] Zouch. Elem. 197.

non debet factum valet—primum et bonum quod sit bona fide, improbatur autem quod sit mala fide vel dolo.[a]

If a contrary construction prevails, government may have greater security for a few specific penalties; but it is at the expense of the interest of commerce, and the security of *all* ship-holders.

Libel dismissed.

[a] Zouch Elem. 41.

POSTSCRIPT:

ADDITIONAL NOTES AND CORRECTIONS.

SUCH of the foregoing DECISIONS *as were made by me, are selected from a great number of cases, determined in the Court, since I held the appointment of District Judge. Those only are inserted which were thought necessary to shew the principles established in a long course of multifarious, often perplexing, and frequently laborious duty. They were not originally intended for publication; but are now permitted to be printed, with the sole view of furnishing information, presumed to be useful and necessary, whatever may be their success in this respect. I was principally induced by a wish to call the attention of the gentlemen of the* Philadelphia bar, *to the topics therein treated; with a desire to facilitate their business, as well as to supersede the necessity of discussions upon* points settled. *Their talents and attainments (which I have long witnessed and highly esteemed) are too conspicuous to need any information from me, in* other points *or departments of their professional duties; in which I should prefer inviting their assistance, to proffering my aid. Perhaps there has been too little anxiety on my part about the* dress *in which the Decisions and comments should appear. I have had few opportunities of affording any assistance in the impression; although I am persuaded that every practicable attention has been paid to its correctness. Errors and omissions are, nevertheless, perceived; as well grammatical and verbal, as in phraseology and punctuation. Some are important; though they are, generally,* "maculæ quas incuria fudit." *They must be submitted, for excuse and correction, or reproof, accordingly as they find readers candidly indulgent, or critically severe. A few are mentioned, as instances requiring correction: and I have deemed it incumbent on me, to add some explanatory and other notes.*

RICHARD PETERS.

ADDITIONAL NOTES AND CORRECTIONS.

PAGE 11, add note after the case of Jennings *vs.* Carson's executors.

During the revolution, and until the establishment of the present national constitution, the several states were vested with the sovereignty within their respective limits, exclusively of the federative government composed of their delegates in congress. The instrument called the *Articles of Confederation*, was agreed upon under the pressure of war, invasion and difficulty. Although it was made for their common safety, it was a bond so feeble, that it had no coercive obligation. It was treated, when it came in collision with state prejudices, or partial interests, as if it had been obtained by duress. The powers exercised under it, were submitted to with a reluctance highly prejudicial and dangerous, when they assumed, even for the obvious benefit of the whole, any decisive authority, or energy. Courts of Admiralty were established in each state, by state authority. In many of the states the facts were triable by juries; as was the case in the suit against the *sloop George* in *New Jersey*. This novelty in admiralty proceedings was found, on experiment, to be incongruous and unsuitable. From these state courts of admiralty, an appeal lay to a court constituted for the purpose by congress. To the end (among other motives) that no decision should improperly affect the rights of subjects of nations with whom a good understanding was essential to our interests, as well as conformable to our wishes. That court was originally composed of members of congress; but it was finally filled by judges appointed by congress, but not of their body. Their decrees were too frequently disputed, and their execution impeded by the states, or individuals, affected by them; and some of them are not executed at this day. After the establishment of the present federal constitution, the admiralty powers were vested by congress in the *district courts*, wherein the jurisdiction originates. From these, appellate cognizance is given to the *circuit courts*, from which an appeal, for final decision, lays to the *supreme court of the United States*. Suits were instituted in several of the district courts, with a view to effectuate the decrees of the court of appeals, before mentioned to have been appointed, under the powers given by the articles of confederation. Some of these suits were carried up to the supreme court, where it was determined, that the district courts had power to effectuate those decrees.

ADDITIONAL NOTES AND CORRECTIONS.

The case of Jennings *vs.* Carson lay, for many years, dormant, after the old court of appeals had decided in favour of *Jennings*, by reversing the decree of the New Jersey state court of Admiralty, which was adverse to his claims. It has been determined in the supreme court of the United States, since the case herein contained was printed off, against the complainant Jennings; and this uncommonly protracted controversy is now ended.

PAGE 12, case of the ship *William*. See a discussion upon points mentioned in this case. Azuni, vol. ii, p. 243 & seq. chap. iv, art. 3.

PAGE 29, note, "Range of a cannon shot," read—fixes the distance "*as* the maritime territorial limits."

PAGE 37. See the case of the *Gratitudine*. 3 Rob. Ad. Ca. 190, for a full and able discussion on the powers of the master over the cargo, in certain cases.

PAGE 72, add note, on the assertion that "*mariners are bound to recover the ship*," &c. See *Azuni*, vol. ii, p. 274, (N. Y. ed.) and note cited from *Emerigon*, *Traite des Assurances*, page 505: a similar doctrine held in argument; but the crew, rescuing the prize, were rewarded.

PAGE 103, add note, in the case of *Brevoor* vs. the *Fair American*.

On further consideration, I have not been satisfied with the *quantum* of salvage decreed. I should have been gratified, if a superior court had reviewed and rectified what I now conceive to have been an error; but no appeal was entered. *Brevoor*, and his associates, should have had a reward at least as great as those usually receive, who, without personal conflict and danger in combat, save property wrecked or deserted, or in peril of so being. Perhaps comparative merit would justify a more ample remuneration. In the latter cases, the Ordinance of *Louis XIV* has had influence with me: and due attention has been paid to the value of the property risked in the saving ship.* I have, too, in all salvage cases, regarded the amount *in value* of the reward; without scrupulously attending to any proportion it bore to the gross amount of the articles saved. I think there is weight in some of the reasoning of *Azuni* on this subject, Mar. L. 279, 280. Whether the merit of the salvors of

* See 3d Rob. Ad. Ca. 288. Ph. ed.

wrecked or abandoned vessels, or goods, should be diminished, because the deserts of rescuers are personally greater, seems not to me clear. This is a subject on which no fixed rules can be established; and it will, therefore depend, in no small degree, on the mere opinions of those who decide. See *Azuni*, note (269), pages 279, 280, and authorities cited on this point.

PAGE 116, (note †) Parts of the first and second sentences, should read thus—" for breaches of neutrality: and when, *in Europe*, some attention was paid to the laws of nations and special conventions, by the courts of the belligerents. The payment of salvage was decreed by the British courts," &c.

PAGE 127, add note,

Freight here is to be understood "*full and entire freight.*" Freight *pro rata itineris* is payable in certain cases. See *Luke* vs. *Lyde*, 2 Bur. 282, 4. Com. Dig. 230, 231, and cases cited.

PAGE 132 (text) "*But mariners in neutral ships are lawfully subject*," &c. "*The person of a mariner belonging to a belligerent nation is subject to capture*," &c. Add note,

This position was taken to be generally agreed, because universally followed in practice by belligerent nations, from the earliest to the most modern periods of military and naval history. *Practical* precedents contradictory to it would give pleasure to every friend to mankind. None have more uniformly warranted this assertion, than the two great and powerful rivals, whose emulation, ambition and endless conflicts have, from remote times to this day, incessantly agitated every quarter of the globe. One of them has recently promulgated opinions to the contrary; and adopted a practice for the accomplishment of his new theory, so unpromising, that it violates all its principles.

France at no time has intermitted the practice generally; nor has it been confined to capturing and restraining the liberty of a subject of her enemy. The *French* directory, by a decree, March 2d, 1797, ordained, that an *American* seaman found on board of a *British* ship, *though impressed into the service*, (for this point was not suffered to be investigated) should be treated *as a pirate*. Thus subjecting an innocent neutral to capital punishment by one enemy, when he was the victim to the violence and aggression of the other. Restraints on, and violence to, unarmed individuals of their enemies, found on land or on

the sea, are without number, and are not confined to revolutionary periods. By an ordinance of France recently practised upon, though promulgated in 1744, a subject of an enemy is not only considered (according to the principles and effect of that law) as liable to capture *in any ship*, but if a vessel is commanded by him, she is confiscable as prize, though the property do not belong to a belligerent. *American* crews have lately been captured, and ships and cargoes burnt and destroyed, not for attempts to enter blockaded ports, or being engaged in illicit commerce, but on the high seas, when pursuing fair and blameless enterprizes, lest, per chance, the progress and situation of a French squadron should be discovered. See page 124, and (among numerous other authorities) 4 Rob. Ad. Ca. 116, 117, 118, for the *English* opinion as to prisoners of war taken in private ships; and in a case of one of their own subjects. Their practice has, for ages, authorized this opinion, as it respects their enemies: nor have neutrals been spared, when their objects required violence, or temporary restraints. It has been generally the *policy*, as it was deemed the *interest* of *England* to embarrass, as it has been that of *France* to encourage, neutral commerce; though some occasional exceptions may be found, in the conduct of both nations.

The changes produced in this eventful period, are so far beyond expectancy or calculation, that, if, in former times, they could have been predicted, they would have been called the dreams of chivalry and romance. A revolution in principles long settled, would not be more unlooked for and improbable. While there is a contest for ascendency, between the *sceptre* formed from a conqueror's *baton*, on the land, and the *trident* predominant on the ocean, it does not seem probable that commercial *halcyon* days on the sea, or the *millennium* of peace and security on the land, will soon arrive. The practice which gave rise to the assertion I incidentally made, is therefore likely to continue. *Principles* are seldom to be tested or proved, by the *professions* of jealous and contending nations, whose actions are regulated more by policy and power (and sometimes by general or partial inferiority) than abstract, however commendable, opinions of humanity or justice. No solid and safe dependence can be placed on principles, either as they respect the freedom of persons, or the rights and security of property,

as we have recently seen them avowed, when present convenience, precarious power, and instable policy, excite their promulgation. Our nation, though now profiting by commerce growing out of the deadly feuds which distract and ruin that of other trading nations, should beware of seduction into any principles, which, however convenient and lucrative they may now be, may hereafter, if the state of things changes with us from neutrality to war, be highly injurious, and rebound upon ourselves.

Azuni had not anticipated the present avowed opinions of the ruler of his favorite nation, on all the points assumed in a late imperial declaration. He has frequently indulged speculations and visions upon some of the subjects of it; yet his opinions are, in many important instances, directly opposed to it, though he is generally the eulogist and zealous advocate of *France*. He has treated more at large, and systematically, on the rights and obligations of *neutrality*, than most other writers. His work is among the most modern treatises, on the momentous topics, to which our interests and safety attract our attention. On these accounts (though in some of his opinions I do not concur) I have often referred to it: and not from any preference of it to the productions of other respectable writers. The publication of it in our language, is also enriched with learned and valuable notes, and citations of authorities, both by the author, and the *American* translator. Those of the latter are interesting, as they refer to circumstances and doctrines affecting our own country, and its laws and regulations, as well in its interior government, as those which apply to our exterior relations.

PAGE 133, (note). The latter sentence is incomplete. It should read—"But if forcibly and unconditionally taken, his case stands on separate grounds, and his contract is interrupted; though jurists are not all agreed on this point."

PAGE 146-7, & seq. Note relative to the *Rhodian* laws to be thus corrected.

Not having considered it so important to establish (if I were capable of so doing) the *authenticity* of the *Rhodian* fragments, as to shew that the *principles* of the *Rhodian* laws were inserted in the digest of *Justinian*, all the facts relative to these fragments were not sufficiently attended to. Nor were the com-

pilations of *Justinian* then examined farther than occasional references required.

It is alleged in the note, (page 146), that the fragments were first printed in *Germany*. It appears they were first printed at *Basle* in *Swisserland*, by *Scardius*, in 1561; and afterwards, in 1596, at *Frankfort*, in *Germany*, by *Leunclavius* and *Marquardus Freer*. They were *Germans*, and the latter was the pupil of the celebrated *Cujas* or *Cujaccius*, as was also *Pierre Pithou* or *Pithöeus*. In this note it is suggested, that the fragments were found in *Germany*. This does not appear clearly in any of the books I have had opportunities of consulting. The *Pithous*, *Pierre* and *Francis*, were brothers, and sons of an eminent civilian. They were *Frenchmen;* and the former most celebrated. He was a Protestant, and had a miraculous escape from the infamous massacre of *St. Bartholomew*. Both were consulted on great juridical and diplomatic questions, being eminently famed for their talents and accurate knowledge of the *Roman* laws; many valuable portions whereof (collected and preserved in their libraries) were by them "*brought forth from the obscurity in which they had been buried for ages.*" *Pierre* was stiled the *Varro* of *France:* his library was in *Paris*, and accounted the most valuable collection in his time. The *Rhodian* fragments were discovered in the library of *Francis Pithou;* which was also greatly valued, when public libraries were rare. In these fragments, as published by *Scardius*, *Azuni* discovers *Latin* words written with *Greek* letters. Such should have been stiled *Latinisms*.

However the fact of authenticity may be, it appears the most probable, that the *text* of the *Rhodian* laws was not inserted in the *Pandects:* though it is asserted by respectable jurists (cited by *Schomberg*, Illustrations 199.) that "the *Romans*, and after them the *Greek* emperors, "*regulated all matters of trade and navigation by the Rhodian laws, which were, on that account, admitted into the Pandects.*" To admit them *verbatim* seems to have been inconsistent with the plan of these collections, which was to condense and abridge, and not exactly to copy the *Roman* or other laws, the principles whereof were adopted. This became the custom of jurists, not only of the period in which the *Digest* was formed, but of succeeding ages. It has not yet ceased, though it is condemned by writers of eminence, as a

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practice which has tended to supersede the use of the original laws; and thereby occasion their loss and final destruction. The *Basilica* or *Procheiron* of the emperor *Basil* or *Basilius*, is only an epitome of *Justinian's* code, which has always been considered of the highest authority; and to form the most essential part of what is called *Corpus Juris Romano-Civilis*.—A title applied in its strict sense, solely to the Institutes, Code and Novels of *Justinian*. The use of the *Basilica*, encouraged by the *Greek* emperors, may have superseded that of the *Roman* code; and occasioned its laying so long in obscurity.

PAGE 171. *United States* vs. *M'Gill*, (note). "*The only enquiry*," &c. This should be corrected thus—

"The only enquiry under this section is—Whether murder was committed on the high seas? The stroke *and* death must be in the same place, to fix a jurisdiction. Although *one* was on the *high seas*, *both* were not, as they should have been to warrant the court in taking jurisdiction, or cognizance in this case: and therefore the cause is *coram non Judice*," &c.

PAGE 228, (text) lines 10 & 11. "*And not at a port of outfit and the owners resident here.*" My meaning is obscurely expressed: it should have been—"and not when this is the port of outfit, and the owners resident here."

PAGE 256, (line 3, of note.) "Expenses for boarding on shore have been voluntarily agreed" should read—"have *sometimes* been voluntarily," &c.

PAGE 277. "*Freight paid by captors*," The ancient laws forfeited the ship carrying *contraband*: but modern practice is to let the ship go free, unless the contraband articles also belong to the owner of the ship, or he is fraudulently concerned in the transaction. The *freight* is always forfeited on *contraband*. On enemy's goods it is paid to the neutral owner. 3 Rob. Ca. 182, 183. Phila. ed.

PAGE 280. *In the instances*," &c. This sentence should read thus—"In the instances, &c. no more profitable employment than cases of salvage afford, could be found for the ships or their crews engaged in the risks and dangers, so much relied on for swelling rewards."

PAGE 327. "*The idea that part of the sovereignty*," &c.—should be thus corrected. "The idea that part of the sovereignty of this country is given to the judiciary *for the purposes here*

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required, is new to me. I consider the judiciary as the expositors of the laws, and not partakers of the sovereignty *for the objects of this suit.*"

There has been so much said and written about the *judiciary* department of our government, that the subject ought now to be well understood. The *judiciary* is a co-ordinate branch, and as much a part of the government as the *legislative* and *executive;* to the end that whatever powers it has, within its constitutional orbit, may be exercised firmly and independently. Other branches have their parts of the qualified sovereignty, assigned to them by the people. What are, and what are not its duties are mentioned in the paragraph, whereof the above quotation, as corrected, composes a part. But I should express myself more accurately at this time, were it necessary to treat on a topic now grown familiar by frequent discussion.

PAGE 339. "*A neutral ship is not obliged to stop to be searched.*" See the case of *Saloucci* vs. *Johnson*, Park. 364, 5, for the opinions of the English common law judges, *Willes*, *Ashurst* and *Buller* (lord *Mansfield* absent) all agreeing on this point. Also, that a neutral *firing on a belligerent* appearing under false colours, is not a breach of neutrality.

PAGE 386. By the result of the case of *Singstrom* et al. vs. the *Hazard*, it must be perceived, that the allegations in the respondent's answer were not satisfactorily proved. One of the mariners (I think rather the carpenter) acknowledged the receipt of a sum of money, *while he was a prisoner*, for work in the way of his trade, which was credited to the owners of the *Hazard*. A conduct so unneutral and base as that of entering on board a privateer, would have met with the discouragement with which such misdemeanors of our seamen have always been treated. Few instances of this kind have ever appeared in proof. I have constantly denied wages, where the facts have, in any reasonable degree, been made out.

In one or two cases it has appeared, that seamen of belligerents have been concealed in American ships, and opportunity afforded of escaping from their duty. I have deemed it incumbent on me to discountenance such illegal and improper acts, though they have not often occurred. In one case, I would not decree wages to such deserters; holding the contract, under such circumstances illegal; and not entitled to the aid of

the court for its execution. If it were attended (as in the same case it was) with the additional misconduct of unlawfully discharging the articled seamen, for the purpose of admitting the deserters at low wages, I have decreed *wages for the voyage*, to the seamen thus unlawfully discharged. No such practices, evidently reprehensible, ought to receive the support or countenance of a neutral court; whose duty it is, so far as it has power, to compel, by all the means it possesses, fair and impartial conduct in the citizens of a neutral country. Those who preserve a candid and irreproachable neutrality, have the stronger claims on belligerents for justice. It is no argument against doing right, that others do wrong. But it is an old maxim, both of law and reason, that he who seeks justice, should do it.

It is often attempted to defeat the effect, and legal intent of the rule, that "mariners unlawfully discharged, or taken away by the *vis major*, shall be paid full wages"—by insisting, that mariners so discharged, or taken away, shall *be bound to earn wages, and seek opportunities of so doing*. This has never been considered as any legal objection to that rule. In *the first instance*, the payment of full wages is not only enjoined, by the maritime laws, as due by the contract, but it operates as a mulct, to punish the act of unlawful discharge; and to deter others from the like breaches of contract. It also proves the rule, that "*equality is equity*." The sailor *forfeits* by his *desertion* or *malfeazance*, and the master or merchant *pays* for his violations of the agreement. He who does the first wrong, is, on every principle, answerable for all consequences. In *the latter case* (seamen taken away) it is not often that those who are by force abstracted from their service, can obtain opportunities of profitably employing themselves. It is enough that they account for their earnings, if they obtain wages. If enquiries were permitted, to shew that *they might have earned wages*, controversies would be both perplexing, and endless.

However severe it may seem, to those who seek for *principles*, only in *individual gains* or *losses*, the maritime laws view these subjects not only as they relate to contracts of individuals, but as they affect the *general* interests of commerce, and the policy of maritime states. If neutral seamen, particularly, when carried off by belligerents, did not look to a recovery of

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wages when liberated, it would be a great temptation to many of them to indemnify themselves by entering on board privateers, or other belligerent ships. This offence they should not be incited to commit, by a privation of what their contracts entitle them to, when their ceasing to serve is not occasioned by their own, but by the act of another, whose power they could not resist. Seamen thus compelled by necessity, and elicited by hopes of gain, would assist (as do all renegades) the more willingly, in depredations on their own countrymen. Deprived of motives to return home, or deterred by fear of punishment, they would remain in foreign service; and thus commerce would also suffer, by a diminution of the numbers required for its prosperity. The *national defence*, too, might be enfeebled by their absence, if naval operations were required: and it is for this, quite as much as for commercial advantages, that the policy of maritime states encourages and protects seamen. The laws of such states, and the policy of their governments, by every means and inducement, invite mariners, whose erratic life weakens or extinguishes local attachments, to return to their country, and remain in its service; in peace, for its commercial wealth and prosperity; in war and danger, for its surest defence and protection.

PAGE 451. "*The attorney of the district does not consider it a clear case,*" &c.

To express both the fact, and my intention at the time, this paragraph should be thus arranged—On deliberation, I am confirmed in the opinion I then gave.

"The attorney of the district does not consider it a clear case; because he has taken great pains, and brought together a mass of information. For the purpose of affording opportunity of exception to my opinion, though I have had no time to consider it maturely, I say that this claimant is not a *resident*," &c.

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ERRATA.

PAGE 45, *for* distributia *read* distribution.
—— 59, *for* variously *read* vicariously.
—— —, *for* Photier *read* Pothier passim.
—— 147, (note) omit comma betwen Marquardus and Freer.
—— 241, line 9 in note, the comma should be after *vessel*, and not after St. Domingo.
—— 255, second line of note, *for* has *read* have.
—— 279, *for* floatsam *read* flotsam.
—— 280, *for* have *read* has.
—— 314, *for* petitions *read* positions.
—— 340, (note) *for* invested *read* interested.
2 Azuni, c. iv, p. 246, 247.

AN APPENDIX

TO

VOLUME SECOND,

CONTAINING,

THE MARINE ORDINANCES OF LOUIS XIV,

A TREATISE ON THE RIGHTS AND DUTIES OF OWNERS, FREIGHTERS AND MASTERS OF SHIPS, AND OF MARINERS,

AND

THE LAWS OF THE UNITED STATES

FOR THE

REGULATION OF SEAMEN, &c.

THE

MARINE ORDINANCES

OF

LOUIS XIV.

While the *French* historians have employed themselves in tracing the commercial prosperity of their nation, at the conclusion of the seventeenth, and opening of the eighteenth centuries, to these ordinances, the civilians and lawyers of every period which has followed their promulgation, have avowed the greatest admiration of their wisdom and their justice. To the genius of *Colbert*, the celebrated minister of *Louis* XIV, *France* is indebted for this excellent code. Desirous of establishing the commerce of his country on a basis which nothing could successfully assail, he selected a masterly hand to compile and arrange these laws, from the prevailing maritime regulations of *France* and other states, and from the experience of the most respectable commercial men of his country. To these regulations which, having formed a part of the maritime code of *Europe*, had been acknowledged as authority by all, were added others which were considered as peculiarly necessary for the trade of *France*. The ordinances thus formed, were published by the *French* king in 1681, and have since enjoyed an uncontroled authority over the commerce of the country for which they were intended, and have obtained the respect of every maritime state.

To the testimony in favour of this collection, which has so often been given by the most celebrated jurists of *Europe*, I can add that of a gentleman of distinguished legal acquirements, who has been recently selected, with the approbation of his country, to occupy the first judicial situation in the state of Pennsylvania. In the case of Morgan & Price, *vs.* the Insurance Company of North America, decided by the supreme court of this state in January 1807, chief justice Tilghman,

REMARKS.

having referred to one of the articles of these ordinances, thus expressed himself—"They and the commentaries on them, have been received with great respect in the courts both of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our own country they are not to be regarded: but on points which have not been decided, they are worthy of great consideration."

The commentaries on these ordinances by *Valin*, we have reluctantly consented to omit, and the design of this work necessarily excludes from it, those articles in the ordinances which are local in their nature, or are confined to the regulation of the courts or the offices of the admiralty of France. Those only have been selected, which are founded on the general principles of maritime law, and which are thought peculiarly entitled to the notice of every commercial lawyer.

THE

MARINE ORDINANCES OF FRANCE.

BOOK II.

OF MARINERS AND SHIPS.

TITLE FIRST.

*Of the Captain, Master and Patron.**

ARTICLE I.

Qualifications of the captain or master of a ship:

NO person shall be capable of being received captain, master, or patron of a ship, till he has navigated five years, and has been publickly examined in navigation, and judged capable by two ancient masters, in presence of the officers of the admiralty, and of the professor of hydrography, if any be in the place.†

No persons to act as captains but those duly qualified.

II. We forbid all mariners to sail in quality of masters, and all owners to constitute any in their ships, before they be received in the aforesaid manner, under pain of three hundred livres, to be paid by each offender.[a]

[a] Laws of the Hanse Towns, art. xv.

* In France those who command vessels of war, or merchant ships destined on long voyages, are called *captains;* masters or patrons are those who command vessels employed in the coasting trade.

† A professor of hydrography is appointed to teach navigation and the sciences immediately connected with it, in all the considerable sea ports in France. His school is open to every one, and formerly each hospital sent two or three boys, annually, to be instructed in the sciences taught by him. tit. 8, book i.

OF THE CAPTAIN OR MASTER.

Art. IX.

III. However, such as are already masters shall not be obliged to undergo any examination.

Pilots may become masters.

IV. Such as have been received pilots, and have navigated two years in that quality, may be constituted masters without any examination, and without any act of the court of admiralty.

Master to chuse the ship's company, and hire the mates, &c.

V. The master shall chuse the ship's company, and hire the pilots, mates, mariners and sailors; but he shall advise with his owners when at the port of their residence.

Boys.

VI. In places where there are hospitals of poor boys, the masters shall be obliged to chuse amongst them their ship-boys.

Master enticing mariners from other ships.

VII. The master who shall entice away a mariner from another master, shall be fined in one hundred livres, applicable one half to the admiral, and the other half to the first master, who may take the mariner back again if he pleases.[a]

Ships about to put to sea.

VIII. A master must take care before he puts to sea, that the ship be right ballasted and laded, and well provided with anchors and tackle, and all things necessary for the voyage.

Cargo to be delivered according to bills of lading.

IX. He shall be answerable for all the goods laded aboard his ship, which he shall be obliged to deliver according to the bills of lading.

[a] Laws of the Hanse Towns, art. xlviii.

OF THE CAPTAIN OR MASTER.

Art. XV.

X. He shall be obliged to keep a book or register, quoted and flourished on every leaf by one of his principal owners, in which he shall insert the day that he was constituted master, the names of the officers and mariners of his company, the rates and conditions of their engagement, the payments he makes them, what he receives and expends for the use of the ship, and generally every thing that concerns the functions of his employment, or of which he has to render any account, or any demand to make.

Master to keep a register.

XI. If, with the master's consent, there is a clerk established in the ship, to take an account of all such things, the master shall be exempt from it.

Ship's clerk.

XII. No master shall lade any goods upon the ship's deck, without the order or consent of his merchants, under pain of being answerable for all the damage that may happen.

Goods not to be put on deck, without the owner's consent.

XIII. Masters shall be obliged, under pain of an arbitrary fine, to be aboard their ships themselves when they go out of any port, harbour or river.

Master to be on board when the ship sails.

XIV. No master, patron, pilot, nor mariner, shall be arrested for a civil debt, being a shipboard to put to sea, except it be for debts contracted for the voyage.

Master or mariner not to be arrested.

XV. The master, before he sets sail, shall take the advice of the pilot, mate, and other principal men of the ship's company.[a]

Master to take the advice of the crew when about to sail.

[a] Laws of Oleron, art. ii.—Laws of Wisbuy, art. xiv.

OF THE CAPTAIN OR MASTER.

Art. XIX.

To furnish a list of his crew to the admiralty.

XVI. He shall be obliged before he puts to sea to give into the admiralty office, of the place of his departure, the names, surnames, and dwelling-places of his company, passengers, and persons engaged for the *West Indies*, and to declare at his return such as he has brought back again, and the places where he left the others.

Not to refit the ship where the owners reside, nor to take up money without their consent.

XVII. He shall not, while in the place where his owners reside, cause the ship to be refitted, buy sails, ropes, or other things for the ship, nor take up money for that account upon the ship, without their consent, under pain of paying the same himself.[a]

Part-owners refusing to contribute to the outfit.

XVIII. However, if with the owner's consent, a ship be freighted, and any of them refuses to contribute towards the necessary charges for fitting out the ship; in that case the master may take up money for bottomry for the account and upon the parts of the refusers, within four and twenty hours after he has sent them a summons in writing to furnish their proportions.

May take up money for necessaries during the voyage.

XIX. He may likewise, during the voyage, take up money upon the ship, either for refitting, victuals, or other necessaries, or may pawn some of the rigging, or sell some goods of his lading, upon condition to pay for them at the rate that the rest shall be sold; all which must not be done without the advice of the mate and pilot, who shall write down in the journal the necessity of such borrow-

[a] Laws of the Hanse Towns, art. iii, iv.
[b] Ibid. art. xi. lix.

ing of money, or selling of goods, and the manner how the money was laid out: but the master shall not in any case have power to sell the ship, without a special procuration from the owners.[a] Art. XXIII.

XX. If any master, without necessity, takes up money upon the ship or rigging, sells goods, pawns the tackle, or states in his accounts false and supposed averages and expenses, he shall pay what he takes up himself, be declared unworthy of being a master, and banished from his ordinary place of residence. Penalty on master taking up money without necessity.

XXI. Masters hired to make a voyage shall be obliged to accomplish it, under pain of making good the damages and losses to the owners and merchants; and to be proceeded against extraordinary if that happens. Master hired for a voyage must accomplish it.

XXII. They may, with the advice of the mate and pilot, cause to be ducked or put in the hold, and inflict such sort of punishments upon drunken and disobedient seamen, or upon such as abuse their comrades, or commit such other faults and offences during the voyage.[b] Seamen disobedient.

XXIII. And such as shall be guilty of murder, assassination, blasphemy, or other capital crimes committed at sea, the masters, mates and quartermasters, shall be obliged under the entire penalty of one hundred livres, to inform against them, to seize Seamen committing crimes at sea.

[a] Laws of Wisbuy, art. xlv.—Laws Hanse Towns, art. lx.

[b] Laws of Oleron, art. xv.

Art. XXVII. their persons, and make the necessary proceedings for instituting process, in order to deliver the criminal into the hands of the officers of the admiralty, at the place of the lading or unlading of the ships within our kingdom.[a]

Master forbid to enter a foreign port unless in case of necessity.

XXIV. We forbid all Masters, under pain of exemplary punishment, to enter, except in cases of necessity, into any foreign port; and in case they be forced into any by tempest or pirates, they shall put to sea again with the first conveniency.[b]

Mates and pilots to be consulted about the latitudes, &c.

XXV. We enjoin all captains and masters, making long voyages, to assemble every day at noon, and oftener if necessary, the mates and pilots, and other expert persons, and to confer with them about the latitudes taken, the courses made, and to be made, and about their calculations.

Masters not to abandon their ships when in danger.

XXVI. They shall not abandon their ships during the voyage, notwithstanding any danger, without the advice of the most expert officers and mariners; and in that case, they shall be obliged to carry off with them the money and the most precious goods they have on board, under pain of answering for it themselves, and of personal punishment.

Effects taken out of the ship and lost.

XXVII. If the effects so taken out of the ship be lost by any accident, the master shall be free from any danger.

[a] Laws of the Hanse Towns, art. xxx.

[b] Laws of Wisbuy, art liii.

OF THE CAPTAIN OR MASTER.

Art. XXXIII.

Master in partnership with the owners.

XXVIII. The masters and patrons who sail in partnership with other owners, shall have no separate dealings for their own particular account, under pain of confiscation of their goods for the benefit of the other partners.

Not to borrow more money than is necessary for their voyage.

XXIX. They shall not borrow for their voyages any more money than what is necessary for their lading, under pain of being deprived of their places, and their share in the profits.

To exhibit to the owners an account of the goods on board, and of monies borrowed.

XXX. They shall be obliged, under the like penalty, to give before their departure, to the proprietors of the ship, a signed account of the quality and price of the goods they have aboard, and of the sums of money borrowed by them, together with the names and dwelling places of the lenders.

Ship's provisions failing at sea, the private stores to be given up for general use.

XXXI. If the common stock of provisions fail at sea, the master may compel such as have any in particular to deliver them up for the use of all, subject to the payment of the price thereof.

Master shall not sell the ship's provisions.

XXXII. No master shall sell the provisions of his ship, nor divert and conceal them, under pain of bodily punishment.[a]

But may sell to ships in distress at sea.

XXXIII. They may however, with the advice and consent of the officers, sell to ships found in necessity at sea, provided they have enough remaining for their own voyage, and render an account thereof to the owners.[b]

[a] Laws of the Hanse Towns, art. ix. [b] Ibid. art. ix.

OF THE CAPTAIN OR MASTER.

Art. XXXVI.

Provisions which remain to be returned to the owners.

XXXIV. At the return of the voyage, the victuals and ammunitions shall be remitted by the master into the hands of the owners.[a]

Master committing certain offences.

XXXV. If the master steer a false course, commit any robbery, or suffer any to be committed in his ship, or fraudently give way to any alienation or confiscation of ship or goods, he shall be punished corporally.

Master delivering the ship to the enemy, &c.

XXXVI. A master being convicted of having delivered to the enemy, or maliciously run his ship aground, shall be punished with death.

[a] Laws of the Hanse Towns, art. x.

OF THE MATE.

Art. V.

TITLE SECOND.

Of the Mate.

ARTICLE I.

THE mate shall take care of the fitting out of the vessel, and before they put to sea, shall examine whether it be sufficiently provided with ropes, pulleys, sails, and other rigging necessary for the voyage. Duty of the mate when in port.

II. At the departure he shall see the anchor hoisted; and during the voyage, he shall visit once a day all the tackle high and low; and if he observes any thing amiss, shall acquaint the master. When at sea.

III. He shall execute in the vessel, and cause to be executed, day and night, the orders of the master. To execute the master's orders.

IV. Arriving at a port he shall cause the cables and anchors to be prepared, and shall have the care and management of the sails and yards, and moorings of the ship. When arriving at a port.

V. In case of the absence or sickness of the master, the mate shall command in his place. Mate to command in the absence of the master.

[a] Laws of the Hanse Towns, art. x.

Art. IV.

TITLE THIRD.

*Of Seamen.**

ARTICLE I.

Seamen to appear at the time appointed.

THE seamen shall be obliged to appear at the days and places appointed, to take aboard the provisions, rig out the ship, and set sail.[a]

Hired for the voyage not to leave the ship until she is moored or unladed.

II. A seaman hired for a voyage must not leave the ship, without a discharge in writing, till the voyage is ended, and the ship moored at the key and unladed.[b]

Seaman deserting before the voyage has commenced.

III. If a seaman leaves a master without a discharge in writing before the voyage is begun, he may be taken up and imprisoned wherever he can be found, and compelled to restore what he has received, and serve out the time for which he had engaged himself for nothing; and if he leaves the ship after the voyage is begun, he may be punished corporally.[c]

Change of the voyage. Seamen may leave the ship.

IV. However, if after the arrival and unlading of a ship at the intended port, the master, instead of

[a] Laws of the Hanse Towns, art. xviii.

[b] Laws of Wisbuy, art. lxiii.—Laws of the Hanse Towns, art. xxiv.

[c] Laws of Wisbuy, art. i.—Laws of the Hanse Towns. art. xliii.

* *Un matelot est un homme de mer qui a acquis une expérience suffisante au fait la manœuvre d'un vaisseau.* Valin Com. tom. i, p. 509.

returning, takes a freight to go elsewhere, the seamen may leave him if they please, except it be otherwise provided by their agreement. Art. IX.

V. After the ship is laded, the seamen shall not go ashore without leave from the master, under pain of five livres for the first fault: and may be punished corporally if they commit a second.[a] Not to go on shore without permission.

VI. We forbid the mariners and seamen to take any bread or victuals, or draw any drink without the permission of the master or steward, under pain of the loss of one month's wages, and of a greater punishment if the fault deserves it.[b] Not to take ship's provisions.

VII. The seamen or other that spoils the drink, destroys the bread, makes the ship leaky, excites a sedition to break the voyage, or strikes the master having arms in his hand, shall be punished with death.[c] Injuring ship's stores.

VIII. Any seaman sleeping in his post or upon the watch, shall be put in irons during fifteen days; and any of the company finding one asleep, and not acquainting the master therewith, shall pay five livres.[d] Sleeping on watch.

IX. Any mariner abandoning the master, and the defence of the ship in time of battle, shall be punished corporally. Non assisting in battle or danger.

[a] Laws of Oleron, art. v.—Laws of Wisbuy, art. xvii.
[b] Laws of the Hanse Towns, art. ix.
[c] Laws of Wisbuy, art. xxiv.—Laws of Oleron, art. xii.
[d] Laws of the Hanse Towns, art. xxv. Ibid. art. xxxvii.

Art. IV.

TITLE FOURTH.

Of the Owners of Ships.

ARTICLE I.

Who may own ships or engage in trade.

ALL our subjects, of any quality or condition whatsoever, may cause ships to be built or bought, fit them out for themselves, freight them to others, and drive a trade at sea by themselves, or by persons interposed; by which gentlemen shall not be reputed to do any act derogatory to their quality, provided they sell nothing by retail.

Owners answerable for acts of the master.

II. *The owners of ships shall be answerable for the deeds of the master; but shall be discharged, abandoning their ship and freight.

Not answerable for crimes or piracies at sea.

III. However, the owners of armed ships shall not be answerable for their crimes and piracies committed at sea by the crews of their ships, any further than for the sums for which they may have given security, except it appear that they are partakers or accomplices in the crimes.

Owners may dismiss the master.

IV. The owners of ships may dismiss the master, reimbursing him, if he requires it, for his part

* The better to oblige owners of ships to be diligent and careful in providing themselves with honest masters, it is by this article declared, that they shall be answerable for the behaviour of the masters they put in their ships, for any sum not exceeding the value of their ships, and of their freight. See Valin Com. tom. i, p. 568.

in the ship, according to the estimation of understanding persons.[a] Art. VI.

V. In every thing concerning the common interest of the owners, the opinion of the greater number shall prevail; and the number shall be computed according to the shares that every man has in the ship. The majority of owners in value to prevail.

VI. No person may constrain his partner to proceed to the sale of a ship, except the opinions of the owners be equally different about the undertaking of any voyage.[c] Owners differing about a voyage, one may compel a sale.

[a] Laws of the Hanse Towns, art. xiv.

[b] See Valin Com. tom. i, p. 575.

[c] Valin Com. tom. i, p. 584.—See also the case of Willings and others *vs.* Blight, ante page 288.

Art. IV.

TITLE FIFTH.

Of Ships and Vessels.

ARTICLE I.

Ships personal property.

ALL ships and vessels shall be reputed personalty, and shall not be subject to redemptions,* nor to pay any duties to the lords of manors.

Liable for the debts of the vender until they make one voyage.

II. All vessels however, shall be liable for the debts of the seller, until they have made a voyage under the name, and at the risque of the new acquirer, except they have been sold by adjudication.†

Sale of a ship on a voyage not to prejudice the creditors of the vender.

III. The sale of a ship in voyage, or under a private contract, shall not in any manner be prejudicial to the creditors of the seller.

Ships to be measured where built, and to be registered.

IV. All ships shall be guaged immediately after they are perfected, by the viewers or overseers of the trade or mystery of carpenters; who shall give an attestation of the burthen of the ship, which shall be registered in the admiralty office.

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* The word which I here render *redemption*, is in the original *retrait lignager*, and implies a power inherent in an heir to revoke some grant, or redeem something mortgaged by his predecessors; to which sort of redemption ships are declared by this law not to be subject.

† The design of making ships sold privately, liable for the debts of the last owner, until they have made a voyage at the risk, and under the name of the new acquirer, is only to prevent the sham sales of ships frequently made only to defraud the creditors of the seller; which certainly is a very just and commendable constitution.

SHIPS AND VESSELS.

Art. VI.

Mode of measurement.

V. To discover and regulate the burthen and capacity of a ship, the hold shall be measured at the rate of two and forty foot *cube* for the sea ton.

Officers of the admiralty to make annually a survey of the ships within their jurisdiction.

VI. The officers of the admiralty shall be obliged under pain of interdiction of their offices, to take every year, in the month of December, an account of all the ships belonging to the inhabitants of their jurisdiction; which shall contain their burthen, age, quality and shape, with the names of the owners; all which they shall send to the secretary of state, who has the management of the marine affairs of that department.*

* The injunction in the last article upon the officers of the admiralty, to take a yearly account of the shipping belonging to the places of their residence, and others within the district of their courts, in order to send it to the proper secretary of state, is a very convincing proof of the regular and excellent methods observed by the *French* court for the improvement of navigation; which if (by the account brought in once a year) they find to decay in any place of the kingdom, diligent enquiry is made into the cause of this fact, and all manner of impediments by which the prosperity of their shipping has been obstructed, are carefully removed.

Nor is this the only advantage attending their diligence and exactness in such matters; for, by those yearly lists, the *French* king knows, within the number of 100 men or less, how many mariners and seamen, foreigners as well as natives, there are within the extent of his dominions; and he likewise knows what number are abroad in long voyages, when they may reasonably be expected back again, and where they are to arrive, and consequently when and where they may be serviceable to him.

BOOK III.

OF MARITIME CONTRACTS.

TITLE FIRST.

Of Charter Parties and Freighting of Ships.

ARTICLE I.

Agreements for freighting ships to be in writing.

ALL articles for freighting of ships shall be reduced into writing, and agreed to by the merchants that freight, and the master or owners of the ships freighted.

Master to observe the orders of the owners in freighting his ship.

II. The master shall observe the orders of his owners, when he freights the ship at the place of their residence.[a]

Charter parties, their contents.

III. The charter party shall contain the name and burthen of the vessel, the names of the master and freighters, the place and time of the lading and unlading, the freight, the time the vessel is to stay at the respective ports, and the conventions about demurrage; to which the parties may add such other conditions as they please.

Loading and unloading to be regulated.

IV. The time of the lading and unlading the goods shall be regulated according to the custom of

[a] Laws of the Hanse Towns, art. lviii.

the respective ports, except it be determined by the charter party.

V. If a ship be freighted by the month, and the time of the freight be not regulated by the charter party, it shall only commence from the day that the ship shall sail. Ship freighted by the month.

VI. He who after having received a summons in writing to fulfil the contract refuses it, or delays it, shall make good all the loss and damage. Non performances of contract.

VII. But if before the departure of the ship, there should happen an embargo, occasioned by war, reprisals, or otherwise, with the country whither the ship is bound, the charter party shall be dissolved, without any damages or charges for either party, and the merchant shall pay the charges of lading and unlading his goods: but if the difference be with one another, the charter party shall be valid in all its points. Embargo dissolves the charter party.

VIII. If the ports be only shut, and the vessel stopped by force for a time, the charter party shall still be valid, and the master and merchant shall be reciprocally obliged to expect the opening of the ports and the liberty of the ships, without any pretensions for damages on either side. Ports shut temporarily not to affect the charter party.

IX. However the merchant may at his own charge unload his goods during the embargo, or shutting up of the port, upon condition either to load them again, or indemnify the master. Merchant may unload his goods during an embargo.

BOOK III. Art. XI.

Master to carry the charter party with him during the voyage.

X. The master shall be obliged, during the voyage, to have aboard the charter party, and the other necessary deeds concerning his lading.

Ship, rigging, &c. pledged for the performance of the charter party.

XI. The ship, rigging and tackle, and the freight and goods laded, shall be respectively affected by the conventions of the charter party.

TITLE SECOND.

Of Bills of Loading.

ARTICLE I.

ALL bills of loading for goods put aboard a ship, shall be signed by the master or the clerk of the ship. Bills of loading to be signed by the master.

II. All bills of loading shall contain the quality, quantity, and mark of the goods, the names of the persons that lade them, and of those to whom they are consigned, the places of departure and unloading, the names of the master and the ship, and the value of the freight. Contents of bills of loading.

III. All bills of loading shall be triple, one shall remain in the hands of the lader, another shall be sent to the person to whom the goods are to be consigned, and the third shall be left in the hands of the master or clerk. To be triple.

IV. The merchants shall be obliged within four and twenty hours after the goods are laded, to present the bills of loading to be signed by the masters, and to give them the acquittances and discharges for the customs of their goods, under pain of paying the damages of the retardment. Merchants to present the bills of loading to be signed.

V. Factors and others, receiving goods expressed in bills of loading, or charter parties, shall be obliged to give a receipt thereof to the masters Factors to give a receipt for goods delivered to them.

BOOK III. Art. VI.

upon their demanding it, under pain of all expenses, damages and losses, and those of the retardment as well as others.

The bill of loading in the hands of the Master to be authentic.

VI. In case of any diversity in bills of loading taken for the same goods, that which shall be in the hands of the master shall be authentic, if filled up by the merchant or his factor; and that which is in the hands of the merchant shall be good, if filled up by the captain.

TITLE THIRD.

Of Freight.

ARTICLE I.

THE freight of ships shall be regulated by the charter party or bill of lading, whether the ships be freighted in whole or in part, for the voyage, or by the month, expressing the burden by the ton, the quintal, by parts, or any other way.

Freight to be regulated by the charter party or bills of loading.

II. If a vessel be hired, and the freighter does not put her full loading aboard, the master shall not take aboard any other goods without his consent, nor without rendering him an account of the freight.

Goods taken on board by the master to pay freight to the charterer.

III. A merchant not loading the quantity of goods mentioned by the charter party, shall notwithstanding pay the freight as if he had done it; and if he loads any more, he shall pay freight for them.

Freight to be paid according to charter party although the vessel may not be full.

IV. A master that declares his vessel to be of greater burden than she is, shall sustain the damages thereby happening to the merchant.

Vessel not carrying as much as was represented.

V. It shall not be reputed an error in the declaration of the ship's burden, if the difference does not exceed one fortieth part.

Allowance in the estimate of the ship's burden.

VI. If the vessel be laded by parts, or by the quintal, or by the ton, a merchant being desirous

Goods to pay half freight if relanded by the owner.

BOOK III. Tit. III.

to take out his goods before her departure, may do it at his own charge, paying half freight.

Goods put aboard without the master's consent.

VII. A master may likewise unlade and lay down upon the shore any goods found in his ship, and put on board there without his knowledge, or take freight at the highest rate that any goods of that quality pay.

Goods unloaded during the voyage.

VIII. A merchant unloading his goods during a voyage, shall nevertheless pay the whole freight, except he be obliged to unload them by the deed of the master.

Vessel prevented performing the voyage by the freighter.

IX. If a ship is stopped in her course, or at the port of her unloading, by the deed of the merchant that freights her, or if she, after having been freighted outward and inward, is forced to return empty, the damages of the retardment, and the whole freight shall be, notwithstanding, due to the master.

Vessel prevented performing the voyage by the conduct of the master.

X. The master shall be likewise answerable for the damages of the freighter, if according to the judgment of intelligent persons, a vessel is stopped in her course, or at a port, by the deed of the master.

Vessel refitted during the voyage.

XI. If a master is obliged to cause his ship to be refitted during a voyage, the freighter shall be obliged either to wait or pay the whole freight; and if the ship cannot be rigged out, the master shall forthwith hire another; and if none can be found, he shall only be paid in proportion to the part he has performed of the voyage.

FREIGHT.

XII. However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight, and pay the other damages and losses.

Vessel unseaworthy.

XIII. The master shall be paid the freight of goods thrown overboard for the common safety, out of the contribution.

Freight of goods thrown overboard.

XIV. Freight shall likewise be due for goods that the merchant may have been forced to sell for victuals, refitting, and other pressing necessities, an account being kept by him of their value, according as the rest are sold at the place of unloading.

Goods sold for necessaries to pay freight.

XV. If there happens an interdiction of commerce with any country to which a vessel is bound, and in her course, so that she returns with her loading, there shall only be due to the master the freight for going thither, even though the ship be freighted to go and come.

Voyage prevented by act of government.

XVI. If a vessel, in the course of her voyage, be arrested by a supreme power, there shall be no freight due for the time of their detention, if freighted by the month; nor no augmentation, if freighted by the voyage; but the food and wages of the seamen, during the detention, shall be reputed average.

Vessel arrested by a supreme power.

XVII. In case the person mentioned in any bill of loading refuse to accept the goods, the master, by the authority of the judges, may cause some to be sold for the payment of his freight, and deposit the rest in a warehouse.

Consignee refusing to take the goods.

FREIGHT.

BOOK III. Tit III.

Good shipwrecked or taken not to pay freight.

XVIII. No freight shall be due for goods lost by shipwreck, or taken by pirates or enemies; and in that case, the master shall be obliged to restore what has been advanced to him, except there be some agreement to the contrary.

Goods ransomed.

XIX. If the ship and goods be ransomed, the master shall be paid his freight to the place where they were taken; and he shall be paid his whole freight if he conduct them to the place agreed to, he contributing towards the ransom.

Contribution to ransom.

XX. The contribution for the ransom shall be made according to the current price of the goods at the place of their unlading, deducting the charges, and upon the total of the ship and freight, deducting the victuals made use of, and the money advanced to the seamen; who shall likewise contribute towards the discharge of the freight, in proportion of what shall remain due to them of their wages.

Goods saved from shipwreck.

XXI. The master shall likewise be paid the freight of goods saved from shipwreck, he conducting them to the place appointed.

Freight *pro rata*.

XXII. If he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

Lien on goods for freight.

XXIII. The master shall not detain the goods in his ship for default of the payment of his freight, but at the time of unloading, he may hinder them

from being carried away, or cause them to be seized in the hoys or lighters.

Lien on goods for freight.

XXIV. The master shall be preferred for his freight upon the goods of his lading, as long as they are in the ship, in lighters, or upon the quay; and he shall likewise be preferred wherever the goods may be, within fifteen days after the delivery, provided they are not passed into the possession of a third person.

Payment of freight.

XXV. Merchants may not oblige masters to take for their freight goods that are fallen in price, or that are spoiled or damnified by their own fault, or by accident.

Goods which may be given up for payment of freight.

XXVI. However, if goods contained in casks, such as wine, oil, honey, and other liquors, have leaked so much that the casks are empty, or almost empty, the merchants that laded them, may abandon them to the master for the freight.

No more freight to be paid than expressed in the bills of loading.

XXVII. We forbid all brokers and others to cause, underhand, more freight to be paid for goods than is expressed in the first contract or charter party, under pain of one hundred livres; and a severer punishment if they deserve it.

A charterer may fill up the vessel with goods of others.

XXVIII. However, the freighter of a whole ship that has not compleated her lading, may take in other goods to make it up, and apply the freight to his own use.

BOOK III.
Tit. IV.

TITLE FOURTH.

Of the Contracts and Wages of Seamen.

ARTICLE I.

Contracts with seamen to be in writing.

ALL agreements between masters and their seamen, shall be reduced into a writing, which shall contain all the conditions, whether they engage themselves by the month, or for the voyage; whether by the profit or freight; if otherwise, the seamen's oath shall be believed.

Goods put on board by seamen.

II. The seamen shall not load any goods upon their own account, under pretence of portage,* nor otherwise, without paying the freight, except it be mentioned in their agreement.

Voyage broken up by the owners, compensation to seamen.

III. If by the fault of the owners, masters or merchants, a voyage be broke before the departure of the ship, the seamen hired for the voyage shall be paid for the time taken up in rigging and equipping the ship, and have one fourth of their wages; and those engaged by the month, shall be paid in proportion, regard being had to the ordinary length of the voyage: but if the voyage be broke after it is begun, the seamen hired for the voyage shall be paid their whole wages, and those hired by the month what is due to them for the time they have already

* By portage is here meant the privilege generally allowed the seamen in France, to carry a venture for their own account.

served, and for that which will be necessary for returning to the place from whence the ship departed; and both shall be paid for their maintenance till they arrive there.

Voyage broken up by the trade being prohibited.

IV. In case of a prohibition of trade, with the place to which the ship is bound, before the voyage begins, there shall be no wages due to the seamen of either sort; who shall only be paid for the time spent in fitting out the ship: and if such prohibition happens during the voyage, they shall only be paid in proportion to the time they have served.

Vessel stopped by an order of state.

V. If the ship be stopped by a sovereign order before the voyage be begun, there shall be nothing due to the seamen, but their wages for fitting out the ship; but if it is during the course of the voyage, those engaged by the month shall have half wages during the detention of the ship, and those engaged by the voyage shall be paid according to their agreement.

Voyage prolonged, seamen to be compensated.

VI. If the voyage be prolonged, the wages of the seamen hired by the voyage shall be augmented proportionably,* and if they voluntarily unlade in a nearer port than that mentioned in the agreement, their wages notwithstanding shall not be diminished: but if they are hired by the month, they shall be in both cases paid for the time they serve.[a]

[a] Laws of Oleron, art. xix. Laws of Wisbuy, art. ii.

* The first part of this article, has relation only to contracts with mariners for the voyage.

BOOK III. Tit. IV.

Seamen serving for a part of the freight. Voyage broken up by freighters.

VII. And as for the seamen and others going by the profit or freight, they shall not pretend any wages for equipping or damages, if the voyage be broke, retarded or prolonged by a superior power, whether before or after the departure of the ship; but if the breaking, retarding or prolonging of the voyage, happens by the fault of the freighters, the seamen shall have share in the costs and damages allowed the master, who, as well as the owners shall pay damages to the seamen, if they be the cause of the hindrance.

Shipwrecked seamen, if ship and goods are all lost, to have no wages.

VIII. In case the ship be taken, or suffer shipwreck, and ship and goods be entirely lost, the seamen shall pretend to no wages; but they shall not however be obliged to restore what has been advanced to them.

Seamen to be paid their wages out of goods saved from shipwreck.

IX. If some part of the ship be preserved, the seamen shall be paid the wages that are due to them out of the wreck they have preserved; and if there be only goods saved, the seamen, even those that are engaged by the freight, shall be paid their wages by the master, proportionably to the freight he receives; and whatever way they be hired, they shall be over and above paid for the time they are employed in saving the wreck and goods.[a]

Mariners dismissed by the master.

X. If a master dismiss a mariner without a sufficient cause before the voyage is begun, he must pay him one third of his wages; and if after the voyage is begun, he shall pay him his whole wages,

[a] Laws of Oleron, art. iii. Laws of the Hanse Towns, art. xxiv.

together with his charges for returning to the place of his departure; nor shall he state that to the account of his owners.[a]

XI. If a seaman be wounded in the service of a ship, or fall sick during the voyage, he shall be paid his wages, and treated at the charge of the ship, and if he be wounded in fighting against enemies or pirates, he shall be cured at the charge of ship and cargo.[b]*

Seamen wounded, or falling sick in the ship's service.

XII. But if being on shore without leave, he be there wounded, he shall not be dressed at the charge of the ship, nor of the loading; and he may be dismissed, without pretending to any more than the wages that are due to him.[c]

Wounded when absent from the ship.

XIII. The heirs of a seaman hired by the month, and dying in the voyage, shall be paid his wages until the day of his decease.[d]

Heirs of seamen dying to receive his wages until his death.

[a] Laws of the Hanse Towns, art. xli, xlii.—Laws of Wisbuy, art. iii.

[b] Laws of Wisbuy, art. xviii, xix.—Laws of the Hanse Towns, art xxxix. xlv.—Laws of Oleron, art. i. vi. vii.—Valin, Com. p. 721, tom. i.

[c] Laws of Wisbuy, art. xviii.—Laws of the Hanse Towns, art. xxxix.

[d] Laws of Oleron, art. vii.—Laws of Wisbuy, art. xix.—Laws of the Hanse Towns, art. xlv.

* *Treated* and *cured* are varied translations of the word *panse* in the original, and should in both places be *cured*, which is the true meaning of *panse*.

SEAMEN.

BOOK III. Tit. IV

Wages to be received by the heirs of a seaman hired for the voyage.

XIV. The half of the wages of a seaman hired by the voyage shall be due to his heirs if he dies outward bound, and the whole if he dies in the way home: and if he sailed by the profit or freight, his heirs shall enjoy his full share, if the voyage be begun before his death.[a]

Wages of a seaman killed in defence of the ship to be paid for the voyage.

XV. The wages of a seaman killed in defending the ship shall be entirely paid as if he had served all the voyage; provided the ship arrives safe at a good harbour.

Seamen made prisoners or slaves.

XVI. Seamen taken in ships and made slaves, shall pretend nothing against the masters, owners, or merchants for their ransom.

Seamen sent on special mission.

XVII. But if any of them, being sent out for the service of the ship, be taken ashore, or at sea, his ransom shall be paid at the expenses of the ship; and if he was sent out for the service of ship and cargo, his ransom shall be paid by both, if they arrive happily at a good port: however the whole shall not exceed three hundred livres besides his wages.[b]

Ransom of captives.

XVIII. The master, immediately after the arrival of the ship, shall take care to regulate the sums appointed for the ransom of captives, and the money shall be deposited in the hands of the principal owner, who shall be obliged forthwith to apply it to that use, under pain of four times the value to be paid by him, for the benefit of the seamen that are in servitude.

[a] Cleirac, page 34. [b] Valin, Com. p. 749, tom. i.

SEAMEN.

XIX. The ship and freight shall be specially liable for the seamen's wages.

Ship and freight liable for wages.

XX. The seamen's wages shall not contribute towards any average, except it be for the ransom of the ship.

Seamen's wages not to contribute to an average.

XXI. What is ordained in this title for the wages and ransom of the seamen, and dressing and treating of the sick, shall take place for the officers and all others belonging to the ship.

Officers and others belonging to ships to have the benefit of the articles relating to seamen.

BOOK III. Tit. V.

TITLE FIFTH.

*Of Contracts of Bottomry, &c.**

ARTICLE I.

Contracts of bottomry.

ALL contracts of bottomry may be made either by a public notary, or under a private signature.

How money may be loaned.

II. Money may be given upon the body and keel of the ship, and upon her rigging and tackle, munitions and provisions, jointly or separately, and upon all, or any part of her loading, for one whole voyage, or a time limited.

No more than the real value of the goods to be taken on bottomry.

III. We forbid all persons to take up, upon their ships or goods on board thereof, more than their real value, under pain of being obliged in case of fraud, to pay the whole sums, notwithstanding the vessel should be lost or taken.

Money taken upon the freight.

IV. We also forbid, under the like penalty, to take up any money upon the freight for the voyage to be made, or upon the profit expected on the lading, or even upon the seamen's wages; except it be in the presence and with the consent of the master, and under one half of the aforesaid wages.

Money loaned to seamen on their wages.

V. We moreover forbid all persons to advance any money to seamen upon their wages and voyages

* Valin, Com. tom. ii, p. 1.

in that manner, except it be in the presence and with the consent of the master, under pain of confiscations of the sums lent, and a fine of fifty livres.

Master to be answerable for monies taken up by the seamen.

VI. The masters shall be answerable in their names, for the total of the sums taken up by the seamen with their consent, except they exceed one half of their wages, and that notwithstanding the loss or taking of the ship.

Ship, rigging, freight, &c. bound for the repayment of the money.

VII. The ship, her rigging and tackle, munitions and provisions, and even the freight, shall be by privilege affected for the payment of the principal and interest of money given upon the body and keel of the ship, for the necessities of the voyage, and the lading.[a]

Money lent on bottomry to the master, the owners being in the place where the loan is made.

VIII. Such as give money upon bottomry to a master without the consent of the owners, if they live in the place, shall have no security nor privilege upon the ship, any further than the part that the master may have in the ship and freight, though the money was borrowed for rigging the ship, or for buying provisions.[b]

Owners refusing to furnish their proportion.

IX. However, the parts of such of the owners as refuse to furnish their proportions for fitting out the vessel, shall be affected for the money lent to the master for the equipment and provisions of the ship.[c]

a Laws of Wisbuy, art xlv.
b Laws of the Hanse Towns, art. lviii.
c Laws of the Hanse Towns, art. xi. & lix.

BOOK III. Tit. V.

Prior liens not to be affected by such loans.

X. Creditors for money formerly due for such things, shall not come in competition with those that have actually lent for the last voyage.[a]

Contracts of bottomry void if loss happens.

XI. All contracts of bottomry shall become void by the entire loss of the effects upon which the money was lent, if that happens by casualty, and within the times and places therein expressed.

What shall be deemed accident.

XII. Nothing shall be reputed a casualty that is occasioned by the defects of the things themselves, or by the fault of the owners, master or merchants, except it be otherwise provided by the contract.

Duration of the risk.

XIII. If the time of the risk be not regulated by the contract, it shall last as to the ship, her rigging, tackle and provisions, from the day she sets sail till she arrives at her intended port, and is moored at the quay; and as to the goods, it shall last from the moment they are laded on board the ship or lighter to be carried thither, till they be unladed and ashore.[b]

Money borrowed on goods.

XIV. A person loading goods and taking up money upon them on bottomry, shall not be acquitted by the loss of the ship and lading, unless he makes it appear that he had there, upon his own account, effects to the value of the sum so borrowed.

Where only part of the goods on which the money was borrowed are on board.

XV. However, if the person that has taken

[a] La Guidon de la Mer. chap. 19, art. ii. & iii.

[b] Cleirac, page 381.

money upon bottomry, makes it appear, that he could not load goods to the value of the sum so borrowed, the contract, in case of loss, shall be diminished in proportion to the value of the effects loaded, and shall only subsist for the overplus; of which the borrower shall pay the interest, according to the current price of the place where the contract is made, till the actual payment of the principal: and if the ship arrives in safety, there shall be due only the interest, and not the maritime profit of the overplus of the effects put aboard.

Lenders on bottomry to contribute to gross, but not to petty averages.

XVI. Lenders of money on bottomry, shall contribute towards gross averages, such as redemptions, compositions, ejections, masts and ropes, cut for the common safety of ship and goods; but not for the simple averages, or particular damages that may happen, except there intervene some agreement to the contrary.

Shipwreck and part of the effects saved.

XVII. However, in case of shipwreck, the contracts of bottomry shall be reduced to the value of the effects that are saved.

Lenders on bottomry to be preferred to insurers.

XVIII. If there be a contract of bottomry, and insurance upon the same loading, the lender shall be preferred to the insurers upon the effects preserved from shipwreck, for his capital, and no further.[a]

[a] See Valin, Com. tom. ii, p. 20.

BOOK III. Tit. VI.

TITLE SIXTH.

Of Insurances.

ARTICLE I.

Who may assure or be assured.

WE allow all our subjects, as well as strangers, to insure, and cause to be insured, within the extent of our dominions, the ships, goods and effects, which shall be transported by sea or by navigable rivers; and we allow the insurers to stipulate a price, for which they will take the peril upon them.

Policy to be in writing.

II. The contract called "Policy of Insurance," shall be reduced into writing, and may be done under private signature.

Contents of a policy of insurance.

III. The policy shall contain the name and dwelling place of the insured, his quality, whether of owner or factor, the effects upon which insurance is made, the name of the ship and master, that of the place where the goods are loaded, and from whence the ship departs, and that whither the ship is bound, and where the goods are to be unloaded; and also the names of all the places where the ship is to touch, the time that the risk is to begin and end, the sums insured, the premium or cost of the insurance, the submission of the parties to arbitrators in case of contestation; and generally all other conditions which they shall stipulate between them.

Insurances may be made without the ship being named.

IV. Goods loaded in Europe for the ports of the Levant, the coasts of Africa, and other parts of the

world, may be insured upon any ship whatsoever, without naming either the master or the ship, provided the name of the person to whom they are consigned be expressed in the policy.

Duration of the risk.

V. If the policy does not regulate the time of the risk, they shall be regulated as are the contracts of bottomry, by the thirteenth article of title fifth.*

Premium where to be paid.

VI. The premium, or cost of the insurance, shall be entirely paid at the signing of the policy; but if the insurance be made upon goods both out and home, and the vessel having arrived at the intended port do not return, the insurers shall restore one third of the premium, except there be a stipulation to the contrary.

Return premium.

Upon what insurances may be made.

VII. Insurances may be made upon the body and keel of the ship, empty or laded, before or during the voyage; upon the provisions and upon the goods, jointly or separately laded on board of any ship, armed or unarmed, alone or in company, for the going out or coming home, for a whole voyage, or a time limited.

Valuation of the articles insured.

VIII. If the insurance be made upon the body and keel of the ship, her rigging, tackle, munitions and provisions, or upon any portion thereof, the estimation shall be made in the policy; allowing the in-

* See ante page xxxviii.

BOOK III. Tit. VI.

surer, in case of fraud, to oblige the concerned to proceed to a new estimation.

Insurances by individuals against being made prisoners.

IX. All navigators, passengers, and others, may insure the liberty of their persons; and in that case the polices shall contain the name, country, residence, age and quality of the person that insures himself; the name of the ship, of the port from whence she sails, and that of her last departure; the sum to be paid in case of being taken, as well for the ransom as the charges of returning; to whom the money shall be paid, and under what penalty.

Insurances on lives forbid.

X. We forbid all insurances upon the lives of any person.

Exceptions.

XI. However, such as redeem captives may insure the lives of those they redeem, and the price of the redemption; which the insurers shall be obliged to pay, if the person redeemed is taken again, or killed, or drowned in his return, or if he perish by any other means but by a natural death.

Women may alienate their estates for the ransom of their husbands.

XII. Women, may lawfully engage themselves, and alienate their patrimonal estates, for the redemption of their husbands.

Money lent to pay a ransom.

XIII. Any person, who, upon the wife's refusal, and by the authority of justice, lends money for the ransom of the husband shall be preferred to the wife upon the husband's estate, except for the restitution of her patrimony.

Minors' contracts for the ransom of their fathers.

XIV. Minors may, likewise, with the advice of their relations, contract such obligations for ransom-

ing their fathers from captivity, without any possibility of revocation.

Freight and seamen's wages not to be insured.

XV. The owners nor masters of ships shall not insure beforehand the freight of their ships; the merchants, the profit they expect by their goods; nor the seamen, their wages.

Money borrowed on bottomry not to be insured.

XVI. We forbid all persons borrowing money upon bottomry to insure it, under pain of the insurance being void, and corporal punishment.

Idem.

XVII. We likewise forbid, under the same penalty, the lenders upon bottomry to insure the profit of the sums lent.

Insurers to run the risk of part, unless expressly stipulated to the contrary.

XVIII. The insured shall still run the hazard of the tenth part of the effects they lade, except there be a positive clause in the policy, declaring that they mean to insure the whole.

Insured on board the ship to bear a part of the risk.

XIX. And if the insured be in the ship, or if they be the owners, they shall nevertheless run the risk of one tenth, though they declare that they mean to insure the whole.

Re-insurances

XX. The insurers may re-insure with others the effects they may have insured, and the insured may likewise cause to be insured the premium of the insurance, and the solvency of the insurers.

Premiums for re-insurances.

XXI. The premiums of the re-insurance may be smaller or greater than those of the insurance.

Effects not to be insured beyond their value.

XXII. We forbid to cause to be insured, or re-insured, any effects beyond their value, by one or several policies, under pain of nullity of the insurance and confiscation of the goods.

If made without fraud, to be in force to the value of articles on board.

XXIII. However, if there happens to be made without fraud, a policy exceeding the value of the effects laded, it shall subsist for the value of the goods: and in case of loss, the insurers shall be bound, every one for the sum by him insured, and likewise to restore the overplus of the premium, retaining only a half per cent.

Double or triple insurances.

XXIV. And if there happen to be several policies likewise made without fraud, and the first contains the value of the goods laded, it shall subsist alone, and the other insurers shall not be bound in the insurance, but shall render the premium, retaining only a half per cent.

Double insurances.

XXV. In case the first policy does not amount to the value of the effects laded, the insurers of the second shall be answerable for the overplus; and if there be effects laded to the value of the insurance, in case of the loss of some part of them, it shall be paid by the insurers there mentioned at so much per * livre of the sums they are concerned in.

Risks borne by the insurers.

XXVI. All losses and damages happening at sea by tempest, shipwreck, running aground or

* The French, in making computations, reckon so much per livre, as we do per cent.

aboard of other ships, changing of course of the voyage or course of the ship, ejection, fire, taking, rifling, detention by princes' declarations of war, reprisals, and generally by all other maritime accidents, shall be at the risk of the insurers.

Deviation discharges the insurers.

XXVII. However, if the changing of the course, voyage or ship, happens by the order of the insured, without the consent of the insurers, they shall be discharged from the risk; which shall likewise take place in all other losses and damages happening by the fault of the insured; nor shall the insurers be obliged to restore the premium, if the time of their bearing the risk be begun.

Insurers not to bear losses occasioned by the fault of the master or mariners, unless expressly stipulated.

XXVIII. Nor shall the insurers be obliged to bear the losses and damages happening to ships and goods by the fault of the master and mariners, except that by the policy they be engaged for the baratry of the master.

Waste.

XXIX. The wastes, diminutions, and losses, happening by the proper defects of the goods, shall not fall upon the insurers.

Insurers not to pay certain charges.

XXX. Nor shall they be concerned in the pilotage, lodemanage, duties of passports, searchings, declarations, anchorage, or in any others imposed upon ships or goods.

Leakage.

XXXI. The goods subject to leakage shall be expressed in the policy; if not, the insurers shall not be answerable for damages befalling them by

tempest, except the insurance be made upon returns from foreign countries.

Insurances on goods by several ships.

XXXII. If the insurance on goods be made separately by several ships mentioned, and the whole loading be put in one, the insurer shall only run the risk of the sum insured upon the ship in which the goods are loaded, even though all the ships together should perish; and he shall restore the premium of the overplus, retaining only a half per cent.

Insurances on voyages, with liberty to touch and trade.

XXXIII. When the masters and patrons have liberty to touch at several ports, the insurers shall not run the hazard of the effects which shall be ashore, though they be intended for the loading they have insured, and the ship be in the port to take them aboard; except there be an express clause for it in the policy.

Insurances made for a particular time.

XXXIV. If the insurance be made for a limited time, without expressing the voyage, the insurer shall be discharged after the expiration of the time, and the insured may cause the goods to be insured again.

Voyage expressed in a policy made for a limited time.

XXXV. But if the voyage be expressed in the policy, the insurer shall run the hazard of the whole voyage; upon condition however, that if it exceeds the limited time, the premium shall be augmented in proportion: nor shall the insurer be obliged to restore any thing, if the voyage be sooner ended.

Change of the voyage by the insured.

XXXVI. The insurers shall be discharged from the risk, without losing the premium, if the insured,

without their consent, send the ship to a place farther distant than that mentioned in the policy, though in the same course: but the insurance shall have its full effect, if the voyage be only shortened.

Voyage broken up before the departure of the ship, premium to be returned.

XXXVII. If the voyage be entirely broke before the departure of the ship, though by the fault of the insured, the insurance shall remain null; and the insurers shall restore the premium, all but a half per cent.

Insurances made after loss or arrival of the vessel insured.

XXXVIII. We declare void all insurances made after the loss or arrival of the effects insured, if the insured knew, or could know of the loss, or the insurer of the arrival, before the signing of the policy.

Presumption of knowledge of the loss.

XXXIX. The insured shall be presumed to have known of the loss, and the insurer of the arrival of the effects insured, if it be found that the news might have been brought from the place of the loss or arrival of the ship, to that of the signing of the policy, after either of these happened, and before the signing; allowing a league and a half per hour, without the prejudice of such other proofs as may be brought.

Insurances made on reports.

XL. However, if the insurance be made upon good or bad news, it shall subsist; except it be made appear, by other proofs than that of the league and half per hour, that the insured knew of the loss, or the insurer of the arrival of the ship, before the signing of the insurance.

BOOK III. Tit. VI.

Deceit or concealment by either party.

XLI. In case of proof against the insured, he shall be obliged to restore to the insurer what he has received, and pay him double the premium; and if there be proof against the insurer, he shall be likewise condemned to the restitution of the premium, and to pay the double to the insured.

Information received by the insured to be communicated to the insurers.

XLII. When the insured receives advice of the loss of the ships or goods insured, of the detention thereof by any prince, and other accidents in which the insurers are concerned; he shall be obliged to cause it forthwith to be signified unto them, or to the person that has signed the policy for them, with protestation to make his abandonment in time of place.

Abandonment by the insured.

XLIII. However, the insured, instead of protestation, may at the same time make his abandonment, and summons the insurers to pay the sums insured, within the time specified in the policy.

When losses shall be paid.

XLIV. If the time of payment be not specified in the policy, the insurers shall be obliged to pay the insurance within three months after the signification.

Shipwreck.

XLV. In case of shipwreck, or running aground, the insured may endeavour to recover the shipwrecked effects, without prejudice of the abandonment, which he may make in time and place; and of the re-imbursement of his charges, as to which his affirmation shall be believed, to the value of the effects preserved.

OF INSURANCES.

BOOK III. Tit. VI.

Under what circumstances abandonment may be made.

XLVI. An abandonment shall not be made but in case of being taken, wrecked, run aground, stopped by a prince, or the entire loss of the goods insured; and all other damages shall only be reputed average, and shall be regulated between the insurers and insured, in proportion to their concerns.

Partial abandonment not to be made. Average.

XLVII. No person can make an abandonment of one part, retaining the other; nor any demand for average, except it exceed one per cent.

When abanment shall be made.

XLVIII. Abandonments, and all demands for the execution of a policy, shall be made to the insurers within six weeks after the news of losses happened upon the coasts of the same province where the insurance is made; and for those that happen in another province of our kingdom, within three months; upon the coasts of England, Flanders and Holland, four months; upon those of Spain, Italy, Portugal, Barbary, Muscovy and Norway, one year; and upon the coasts of America, Brazil, Guinea, and other remote countries, two years; and that time being expired, the insurers shall not be heard in their demands.

Vessel detained, when abandonment shall be made.

XLIX. In case of a ship's being detained by any prince, the abandonment shall not be made until six months afterwards, if the ship be stopped in Europe or Barbary; and a year in remoter countries; reckoning from the day that that was signified to the insurers: and in that case, the exception against the insurers mentioned in the precedent article, shall only commence from the day that they may have begun to act therein.

Goods perishable, when abandonment may be made.

L. However, if the goods so stopped be perishable, the abandonment may be made after six weeks, if they be stopped in Europe or Barbary; and after three months, if in a remoter country; counting from the day that the stoppage was signified to the insurers.

Insured to exert himself for the release of the property.

LI. The insured shall be obliged during these delays to use their utmost endeavours to get the arrest taken off the effects that are detained; and the insurers may do it themselves, if they please.

Vessel detained by an order of government.

LII. If a vessel be detained by our order, in any port of our kingdom, before the voyage be begun; the insured may not, because of that arrest, abandon his effects to the insurer.

Insured, when he makes his abandonment to state the insurances made by him.

LIII. The insured shall be obliged, in making his abandonment, to declare all the insurances that he has caused to be made, and the money taken on bottomry upon the effects insured; under pain of being deprived of the benefit of the insurances.

Concealment of insurances.

LIV. If the insured conceals any insurances or contracts of bottomry, which, with these he declares, exceed the value of the effects insured, he shall be deprived of the benefit of the insurances, and obliged to pay the sums borrowed, notwithstanding the loss or taking of the vessel.

Shall not sue for more than the amount of his loss.

LV. And if he sues for payment of the sums insured beyond the value of his effects, he shall further be punished exemplarily.

LVI. The insurers of the loading shall not be obliged to pay the sums by them insured, beyond the value of the effects of which the insured proves the loading and the loss.

Insurers of loading not to pay beyond the value of the goods insured.

LVII. The evidences * of the loading, and loss of the effects insured, shall be signified to the insurers immediately after the abandonment, and before they be sued for payment of the sums insured.

Proofs to be furnished to the insurers.

LVIII. However if the insured receives no news of his ship, he may, after the expiration of one year (reckoning from the day of departure) for the ordinary voyages, and after two years for long voyages, make his abandonment to the insurers, and demand payment, without any necessity of an attestation for certifying the loss.

If no information of vessel insured be received in one year, payment of loss may be demanded.

LIX. Voyages from France into Muscovy, Greenland, Canada, Newfoundland, and other coasts and islands of America, to the Green Cape and coasts of Guinea, and all other places beyond the tropic, shall be reputed long voyages.

What are long voyages.

LX. After the abandonment is declared, the effects insured shall belong to the insurer; who must not, under pretence of the returning of the vessel, delay to pay the sums insured.

Effect of the abandonment

LXI. The insurer may bring what proofs he

The insurer may oppose by proofs, the claims of the insured.

* By those are meant bills of loading, and other necessary certificates, papers and writings.

can against the validity of the attestations; but shall nevertheless be condemned by provisions to pay the sums insured; security being given him by those to whom he pays them.

Insurances on goods belonging to him made by the master.

LXII. A master causing goods loaded on board his own ship for his own account to be insured, shall be obliged, in case of the loss thereof, to prove the buying of them, and to produce a bill of loading signed by the clerk and the pilot.

Insurances by mariners.

LXIII. All mariners and others, who shall bring goods from foreign countries upon which they have caused insurance to be made in France, shall be obliged to leave a bill of lading in the hands of the French consul or his chancellor, if there be any in the place where the goods are loaded; and if otherwise, in the hands of some eminent merchant of the French nation.

How the value of goods insured shall be ascertained.

LXIV. The value of the goods shall be proved by books or invoices; if otherwise, the estimation thereof shall be made according to the current price at the place and time that they were loaded: included all duties and charges in getting them abroad; except the value be expressed in the policy.

Valuation for returns of outward cargo.

LXV. If insurance be made upon returns from a country where traders only carry on by barter, the returns shall be made according to the value of the goods given in exchange for them, including the charges of their transportation.

Insured in case of capture may redeem the goods.

LXVI. In case of capture the insured may re-

deem their effects without the order of the insurers, if they cannot give them advice thereof; but they must afterwards inform them by writing of the composition they have made.

Goods ransomed.

LXVII. The insurers may take the composition for their benefit, in proportion to their concerns; and in that case they shall be obliged forthwith to make their declaration, to contribute actually towards the payment of the ransom, and to run the hazard of the return; or otherwise to pay the sums by them insured, without having any pretensions upon the ransomed effects.

No blanks to be left in policies, and policies to be drawn up by disinterested persons.

LXVIII. We forbid all makers of policies, clerks of the chambers of insurance, notaries, brokers and others, to cause to be signed any policies where any blank is left, under pain of all damages and charges; and likewise to draw up any in which they themselves are concerned directly or indirectly by themselves, or by persons interposed; or to take any cession of right from the insured, under pain of five hundred livres for the first time, and deprivation of their employments in case of a relapse; which penalties shall not be in any manner moderated.

Policies to be recorded in the admiralty.

LXIX. We likewise enjoin them under the like penalties, to have a register quoted and flourished on every leaf by the lieutenant of the admiralty, and therein to record the policies they draw up.

Contract to submit to arbitration.

LXX. When the policy contains a submission to arbitration, and one of the parties desire to go

BOOK III. Tit. VI.

before the arbitrators before any contest happens, the other party shall be obliged to consent; or if otherwise, the judge shall name for the refuser.

Proceedings when disputes are left to arbitration.

LXXI. Within eight days after the nomination of the arbitrators, the parties shall deliver the deeds and writing into their hands; and within the eight days following, they shall pronounce sentence thereupon.

Decisions by arbitrators.

LXXII. The decisions of arbitrators shall be confirmed in the court of admiralty, within the jurisdiction of which they are pronounced: and we forbid the judge, under that pretence, to take any knowledge of the cause, under pain of nullity, and all the charges, costs and damages of the parties.

Appeals from decisions by arbitrators.

LXXIII. Appeals from decisions by arbitrators sentences and confirmations, shall be carried before our courts of parliament, and shall not be received until the penalty expressed in the clause of submission be paid.

Execution of the sentence of arbitrators.

LXXIV. The sentences of arbitrators may be executed, notwithstanding the appeals; security being given before the judges who confirm them.

TITLE SEVENTH.

*Of Averages.**

ARTICLE I.

ALL extraordinary charges for the ships and their lading jointly or separately, and all damages which shall befal them from the time of their loading and departure, till their arrival and unloading, shall be reputed average. What shall be reputed average.

II. The extraordinary charges for the ship alone, or for the goods alone, and the damage befalling either in particular, shall be simple and particular averages, and the extraordinary charges paid, and damages suffered for the common good and safety of ship and goods, shall be gross and common averages. Simple and gross average.

III. The simple averages shall be borne and paid by the owner of the thing that suffers the damages, or occasions the charge; but the gross or common averages shall fall upon the ship and goods at so much per livre, in proportion to their value. Who shall pay average.

IV. The loss of cables, anchors, sails, masts, and ropes, occasioned by tempest or any maritime accident, and damage, happening to the ship by the fault of the master or company, by neglecting to shut close the hatches, moor the ship, providing Simple average.

* Valin, Com. tom. ii, p. 158.

BOOK III. Tit. VII.

good tackle and ropes, or otherwise are simple averages, and shall be borne by the master, ship and freight.[a]

Simple average.

V. Damages happening to goods by their own defects, tempest, being taken, shipwrecked, or run aground; the charges paid for preserving them, and the duties, impositions, and customs, are likewise simple averages, at the cost of their owners.

Gross average.

VI. Things given by composition to pirates, for ransom of the ship and loading; those that are cast into the sea, masts or cables broke or cut, anchors and other effects abandoned for the common safety, damage done to goods remaining in the ship by throwing over others; the dressing and treating seamen wounded in the defence of the ship, and the charges of lightening to enter into a port or river, or to get a ship afloat, shall be gross or common averages.

Gross average.

VII. The maintenance and hire of the seamen of a ship detained by a sovereign prince's order, shall likewise be reputed gross averages, if the ship be hired by the month; but if by the voyage, they shall be borne by the ship only, as simple averages.

Petty average.

VIII. The lodemanage, towage, and pilotage for entering into, or going out of a river are petty averages, one third to be paid by the ship, and the other two by the goods.[b]

[a] Laws of Wisbuy, art. xii. [b] Ibid. art. xliv. lvi. lix, lx.

Averages which shall be paid by the master.

IX. The dues for the passport, search, declaration, anchorage, buoys, and sea marks, shall not be reputed averages, but shall be paid by the master.

Ships running aboard of each other.

X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.[a]

Damages occasioned by the master.

XI. But if the damage be occasioned by either of the masters, it shall be repaired by him.[b]

[a] Laws of Oleron, art. xiv.—Laws of Wisbuy, art. xxvi. l. lxvii. lxx.

[b] Laws of Wisbuy, art. xxviii. li.—Laws of Oleron, art xv. Valin, Com. tom. i, p. 188.

BOOK III. Tit. VIII.

TITLE EIGHTH.

Of Ejections and Contributions.

ARTICLE I.

Before masts are cut away, or goods thrown overboard, master to consult the ship's company.

IF by tempest, or being chased by enemies or pirates, the master believes himself obliged to throw overboard part of his lading, to cut or force his masts, or leave his anchors; he must take the advice of the merchants, and principal men of the ship's company.[a]

Difference of opinion.

II. If they differ in their opinions, that of the master and ship's company shall prevail.

What shall be first thrown overboard.

III. The utensils of the ship, and other things that are least necessary, heaviest, and of least value, shall be thrown overboard first, and afterwards the goods between decks: however, all must be done by the order of the captain, with the advice of the ship's company.

An account of the goods thrown overboard to be kept.

IV. The clerk, or such other person as performs his function, shall insert the deliberation in his book, as soon as possible; and shall cause it to be signed by those that voted, or otherwise shall mention the reason why they did not sign; and shall take as exact an account as he can of the goods thrown overboard or damnified.

[a] Laws of Oleron, art. viii. ix.—Laws of Wisbuy, art. xx. xxi. xxxviii.

Protest to be made by the master.

V. At the first port where the ship touches, the master shall declare before the judge of the admiralty, if any be; and if none, before the ordinary judge, the reason of the ejection, or the cutting or forcing of his masts, or leaving of his anchors, and if it is in a foreign country he arrives, he shall make that declaration before the French consul.

Master to give an account of the goods lost at the place of unloading.

VI. The master shall take care to make the account of the losses and damages, at the place where the ship is unloaded; and the goods cast away, and those that are preserved, shall be esteemed according to the current price thereof, at the said place.[a]

How the loss by throwing goods overboard shall be restored.

VII. The reparation for the payment of losses and damages, shall be made upon the goods lost and preserved, and upon the half of the ship and freight, at so much per livre, according to their value.*

Bills of loading and invoices of goods thrown overboard to be produced.

VIII. The better to judge of the quality of effects thrown overboard, the bills of loading and invoices, if there be any, shall be produced.

Goods to contribute in proportion to their real value.

IX. If the quality of goods be misrepresented by bills of loading, and they be found to be of greater value than they were said to be by the mer-

[a] Laws of Oleron, art. viii.—Laws of Wisbuy, art. xxxix.

* By the 8th article of the Laws of Oleron, the master may contribute for his ship or for his freight, as he pleases.

BOOK III. Tit. VIII.

chant that laded them, they shall contribute, if saved, in proportion to their real value; but if lost, shall only be paid according to the bills of loading.

Idem.

X. And if on the other hand, the goods are found to be of a meaner quality, and be preserved, they shall notwithstanding contribute according to the declaration: and if they be cast away or damnified, they shall only be paid according to their value.

Provisions and munitions not to contribute.

XI. The munitions and provisions, and seamen's clothes and wages, shall not contribute towards the ejection; but such things as are cast away shall be paid by contribution, out of the other effects.

Effects for which there is no bill of loading.

XII. Effects for which there is no bill of loading, shall not be paid, though thrown overboard; but if they are saved, they shall nevertheless contribute.[a]

Goods which were on deck not to be paid for.

XIII. There shall no contribution be demanded for payments of such effects as were upon the deck, if they be thrown overboard, or damnified by the ejection; allowing the owner his recourse against the master: however, if they are preserved they shall contribute.

Damage done to the ship.

XIV. Nor shall any contribution be made, for damage befallen the ship, except it be done of purpose to facilitate the ejection.

[a] Laws of Oleron, art. viii.—Laws of Wisbuy, art. xliii.

XV. If the ejection does not save the ship, there shall be no contribution; and the goods that are saved from shipwreck, shall not be in any measure liable to pay the loss or damage of those that have been thrown away or spoiled.

If ship is not saved by the ejection there shall be no contribution.

XVI. But if the ship being once preserved by the ejection, continuing her course, comes afterwards to be lost, the effects that are preserved, shall contribute towards the ejection, according to their value, in the condition they shall be in, charges being first deduced.

Ship lost after the ejection.

XVII. The effects cast away shall not contribute in any case, towards the payment of damages, happening after the ejection, to the goods that are preserved; nor the goods to the payment of the ship, if lost or broken.

Damage sustained after the ejection.

XVIII. However, if the ship be opened by the determination of the chief men of the company, and of the merchant, if any be, to take out the goods; they shall in that case contribute for the reparation of the damage done to the ship, to take them out.

Ship injured by taking out goods.

XXI. In case of the loss of goods put aboard of any bark for lightening of a ship entering into any river, reparation shall be made by the whole ship and loading.

Goods lost which have been put on board lighters for the benefit of the ship.

XX. But if the vessel perish, with the rest of its loading, no reparation shall be made by goods put out into barges, though they arrive safe at their port.

Vessel lost after goods have been put into barges.

Lien on goods for contribution.

XXI. If the owners of any goods that ought to contribute, refuse to pay their proportion, the master may, for the security of the contribution, retain, or by the authority of justice, may sell goods, to the value of their said proportions.[a]

Goods which have been thrown overboard received by the owners.

XXII. If after the reparation, the effects thrown overboard be recovered by the owners, they shall be obliged to restore to the master, and the others concerned, what they have received of the contribution, deducting for the damage caused to their goods by the ejection, and for the charges of recovering them.

[a] Laws of Oleron, art. ix.

A TREATISE

ON THE

RIGHTS AND DUTIES

OF

OWNERS, FREIGHTERS AND MASTERS OF SHIPS,

AND OF MARINERS.

A TREATISE, &c.

ARTICLE I.

*Of the Owners, Part-owners, and Freighters of Ships.**

Art. I.

Part-owners may freight the vessel.

UPON any probable design, the major part of the owners may, even against the consent, though not without the privity and knowledge, of the rest, freight out their vessel to sea.

If it should so fall out, that the major part in number protest against the voyage, and but one left that is for the voyage, yet the same may be effected by that party if there be equality in partnership.

Owners are not obliged to continue their partnership.

Owners, by law, can no ways be obliged to continue their paction or partnerships, without separating; but yet if they will separate, the law marine requires some considerations to be performed before they can so do. And therefore, if the ship be newly built, and has never yet made a voyage, or is newly bought, she ought to be subject to one voyage, upon the common outread and hazard, before any of the owners shall be allowed to separate and discharge their parts; but by the laws of England, the owners may, before any such voyage, sell or transmit their right.

* This treatise is taken from the Sea Laws, page 442, where it is said to be "Three short discourses of owners and masters of ships and of mariners, being a collection of what is most material upon these subjects in the treatise *De Jure Maritimo & Navali*, and several others, with some alterations and reflections."

Art. I.

Part-owner refusing to fit out or sell his share of a vessel.

If it falls out that one is so obstinate, that his consent cannot be had, the law will enforce him either to hold, or to sell his proportion; but if he will set no price, the rest may rig her out at their own costs and charges, and whatsoever freight she earns, he is not to have any share or benefit in the same. But if such vessel happens to miscarry, or to be away, the rest must answer him his part or proportion in the vessel. But if it should fall out, that the major part of the owners, in value, refuse to set out the vessel to sea; there, by reason of the inequality they may not be compelled; but then such vessel is to be valued and sold: the like, whether part of the owners become deficient or unable to set her forth to sea.*

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* *The following letter from Sir* LEOLINE JENKINS, *is extracted from the second volume of his Works, page* 792.

To the right honourable the lord high chancellor of England.

April 2*d*, 1680.

MY LORD,

HAVING received your lordship's order, interposed in the high court of chancery on the 20th of November last, between George Clare, complainant, and Thomas Newman and others, defendants; I appointed a day to the proctors of each side to attend with their advocates, as they have since done. I did at the time appointed, cause your lordship's order and the said bill and plea to be publicly read, and heard the advocates, upon the law and practice in such cases, as also my register, in relation to the several proceedings had in the court of admiralty, about fitting out the part of the ship Gustavus, belonging to Mr. Clare, the complainant, upon the later voyages, whereto he did not contribute his part. Upon the whole matter I humbly

OWNERS AND FREIGHTERS OF SHIPS.

Art. I.
Appointment of the master.

The master of the vessel is eligible by the part-owners in proportion, not by the majority, and he that is most able, is to be preferred. The custom of the latter ages has been such, that few have gone out in that condition, but those that have commonly had shares or parts in the same vessel. In the pre-

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certify to your lordship, that in regard Mr. Clare was according to the ancient practice of the admiralty in England, duly summoned and admonished to contribute his quota, as part-owner, to the setting out of the ship, and that he refused or neglected so to do, and that thereupon a due appraisement was made, and bail given by Mr. Newman and others, owners of the other parts of the ship, to bring back the ship, and consequently Mr. Clare's part of it, within the time limited in the acts of court for letting his part go out upon bail; or else, in case the ship should miscarry, to pay him the value of his part, as it stood appraised before its fitting out, and that the said Mr. Clare's part was repaired, fitted and set out in these voyages at the charge of the other part-owners; he the said Mr. Clare ought not, by the civil law nor by the practice in the admiralty in our neighbouring nations, nor particularly by the course of the admiralty of England, to have any share in the freight or any other profits made by the said ship in those voyages.

If the law and practice of England were otherwise, it would be very mischievous to our shipping and navigators, the greatest part whereof is carried on by the contribution and joint force of part-owners; all partnership would cease, if a partner, bearing no part of the burthen should come to a share in the profits. Nor would there scarce any sea voyage go forward if it were not in the power of the major part of the owners to over-rule a cross-grained partner and to dispose of the whole ship, securing to such partner either that the ship shall return, or if it do miscarry, that he shall be paid the value of his part, as it was appraised before it was set out. All which I humbly submit to your lordship's great wisdom.

L. JENKINS.

Art. I.

ferring therefore of a master, his ability and honesty are to be considered, since on him rests the charge, not only of the vessel, but of the lading; their very actions subjecting the owners to answer for all damage that shall be done, or occasioned by him or his mariners, be it in the port, or at sea, to the loading, or goods of the merchants or loaders; and they are made liable, as well by the common law of England, as the law marine.

Owners answerable for the acts of the master.

Master responsible to the owners for his actions.

If the master commits offences, either negligently or wilfully, he shall be responsible to his owners for the reparation of damages, nor are they bound to join as the mariners. So likewise if the ship has earned freight, and part of them receive their parts, the rest may bring their action for their share, without joining with the others.

Vessel rebuilt.

If a ship be broken up, or taken in pieces, with an intent to convert the same to other uses; if afterwards upon advice, or change of mind, she be rebuilt with the same materials, yet this is now another, and not the same ship, especially if the keel be ript up or changed, and the whole ship be once taken asunder and re-built; there determines the partnerships as to the ship.

Vessel repaired.

But if a ship be ript up in parts, and taken asunder in parts, and repaired in parts, yet she remains still the same vessel, and not another; nay, though she hath been so often repaired, that there remains not one stick of the original fabric.

If a man shall repair his ship with plank or other materials belonging to another, yet the ship maintains and keeps her first owners.

Vessel built with materials belonging to another.

But if a man shall take plank and materials belonging to another, and prepared for the use of ship-

ping, and with them build a ship, the property of the vessel follows the owners of the materials, and not the builder. Art. I.

But if a man cuts down the trees of another, or takes timber or planks prepared for the erecting or repairing of a dwelling house, nay, though some of them are for shipping, and builds a ship, the property follows, not the owners, but the builders.

If a ship be sold together, with her tackle, furniture, apparel, and all other her instruments thereunto belonging; yet by those words the ship's boat is not conveyed, but that remains still in the owners; so it is if the ship be freighted out, and afterwards at sea she commits piracy; the ship is forfeited, but the boat remains still to the owners. Ship's boat.

And though ballast is generally used in shipping by those ships that are freighted outwards, in order to the bringing home of goods, yet is not the same any part of the furniture of the vessel, and so it was adjudged in debt on bond. The condition was, that whereas the plaintiff had bought of the defendant a ship, if the plaintiff shall enjoy the said ship with all the furniture belonging to the same, without being disturbed, for the ship, or any furniture appertaining to it, that then, &c. and the case fell out to be, that after the sale of a ship, a stranger sued the plaintiff for certain monies due for ballast, bought by the defendant for the same ship, in which suit he obtained sentence; upon which the ship was seized. The question was, if ballast be furniture to a ship or not? And it was resolved that it was not; for though it may be as necessary as sails, yet it is not always so; for sometimes they sail without Ballast not a part of the furniture of a ship.

Art. I.

ballast, for the merchandize itself may be sufficient to answer that purpose.

Ship which has become forfeit by having committed piracy sold before seizure.

If a ship commits a piracy, by reason of which she becomes forfeited; if before seizure she be *bona fide* sold, the property shall not be questioned, nor the owners divested of the same.

Money borrowed by the master for repairs of the ship.

If a master shall take up monies to mend or victual his ship where there is no occasion, (though generally the owners shall answer the fact of the master) yet here they shall not, but only the master. But if there were cause of mending the ship, though the master spends the money another way, yet the owners and ship become liable to the satisfaction of the creditor; for it were very unreasonable that the creditor should be bound to take upon him the care of repairing the ship, and supply the owners' room, which must be so, if it should be necessary for him, that the money be laid out upon the ship; so on the other hand, it stands with reason that he be sure that he lends his money on such an occasion, as whereby the master's fact may oblige the owners, which he cannot do otherwise, unless he knows that the money borrowed was necessary for the repair of the ship; and therefore if the ship wanted some repairs, and a far greater, and more extravagant sum was lent than was needful, the owners shall not be liable for the whole.

Possession taken of a ship without title.

If a man gets possession of a ship, having no title to the same, by the law marine, he shall answer such damage as the ship in all probability might have earned; and the reason of that is, because the only end of shipping, is the employment thereof; but if a warrant be directed out of the ad-

Art. I.

miralty to an officer to arrest such a ship, and *salvo custodire*, who by force of the same, enters into the same ship, though the warrant does not mention that the officer should carry away the sails of the same ship, yet he may justify the taking the same, for that he cannot *salvo custodire* the same ship, unless he carries away the sails.

By an officer of the admiralty.

If a ship be freighted out, and accordingly receives in her loading pursuant to agreement, and afterwards an embargo happens, and the loading is taken as forfeited, yet the owners shall notwithstanding receive freight, for here is no fault in them, but only in the merchant.

Freight to be received on goods forfeited.

In *Aqua dulci* a ship may become a deodand, but in the sea, or in *Aqua salsa*, being an arm of the sea, though it be in the body of the country, yet there can be no deodand of the ship, or any part of it, though any body be drowned out of it, or otherwise come by their death in the ship, because on such waters, ships and other vessels are subject to such dangers upon the raging waves, in respect of wind and tempest; and this diversity all our ancient lawyers do agree in; and it does more especially appear in the parliament rolls, where upon a petition, it was desired, that if it should happen that any man or boy should be drowned by a fall out of the ship, boat or vessel, they should be deodands: whereupon the king, with the advice of his judges, and council learned in the laws, made answer; that the ship, boat or vessel, being upon the sea, should be adjudged no deodand, but being upon a fresh river it should be a deodand, but the king will shew favour. There are abundance of

When a ship may become a deodand.

Art. 1.

other petitions upon the like occasion, in the records of parliament.

A ship becoming a deodand.

A ship lying at Rotherhithe, in the county of Kent, near the shore, to be careened and make clean; it happened that one of the shipwrights being at work under her at low water, the vessel (then leaning aside) fortuned to turn over the contrary side, by means of which the shipwright was killed: upon a trial at bar, where the question was; whether this deodand did belong to the earl of Salisbury, who was lord of the manor, lying contiguous to the place where the man was slain, or to the almoner as a matter not granted out of the crown; in that case it was resolved, that the ship was a deodand, and the jury thereupon found a verdict for the lord of Salisbury, that the same did belong to his manor.

Thus men for their necessity and safety, having from hollow trees, nay reeds, twigs and leather, (for such were the rude beginnings of those stupenduous things we now admire) advanced the art to that degree, as to render it the most useful thing extant; and as the mathematics, astronomy, and other sciences have added to its security; so have succeeding ages from time to time, provided privileges and laws, by which it hath always been regulated and governed; the which upon all occasions, and in all courts have generally had as genuine a construction as might be to the marine customs; and therefore at this day, if a ship be taken away, or the owners dispossest, they may maintain an action of trover and conversion for an eighth or sixteenth part of the same, as well by the common laws of this kingdom,

Part-owners may bring separate suits for their shares.

as the law marine, and they need not join with the rest of their owners. Art. I.

This is what that author has delivered to us concerning owners of ships, and the building, victualling and providing thereof, which being according to the common practice of the country, I thought fit to insert it in this part of my discourse, in which I am resolved to omit nothing that may tend to the clearing up the matter of which I treat; and therefore I shall likewise insert what he further says of masters of ships and mariners, &c. to the following purpose.

Art. II.

ARTICLE II.

Of Masters of Ships, and their Duty and Privileges.

Duties of the master.

A MASTER of a ship is no more than one, who for his knowledge in navigation, fidelity, and discretion, hath the government of the ship committed to his care and management, and by the common law, by which properties are to be guided, he hath no property either general or special, by the constituting of him a master; yet the law looks upon him as an officer, who must render and give an account for the whole charge, when once committed to his care and custody; and upon failure to render satisfaction; and thereof if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself, or his mariners, he must be responsible.

When the courts of common law and when the court of admiralty shall take cognizance of the acts of a master.

If the fault be committed in any port, haven, river or creek, or any other place which is *infra corpus comitatus*, the common law shall have jurisdiction to answer the party damnified, and not the admiralty; but if the same be committed *super altum mare*, the admiralty shall have jurisdiction of the same; yet if it be on a place where there is *divisum imperium*, then according to the flux or reflux the admiralty may challenge; the other of common right belonging to the common law.

And therefore so soon as any merchandize, or commodities are put aboard a ship, whether she be riding in port, haven, or any other part of the seas, he that is *exercitor navis*, or master of the ship, is chargeable therewith; and if the same be there lost

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Master answerable for every thing put on board the ship.

or purloined, or sustain any damage, hurt or loss, whether in the haven or port, or upon the seas, after she is in her voyage: whether it be by mariners, or by any other through their permission, he that is *exercitor navis*, must answer the damage; for that the very loading of the goods aboard the ship does subject the master to answer the same: and with this agrees the common law, where it was adjudged that goods being sent aboard a ship, and the man having signed his bills of loading for the same, the goods were stowed, and in the night divers persons, under the pretence that they were press masters, entered the ship and robbed her of those goods: the merchant brought an action at the common law against the master, and the question was,—Whether he should answer for the same? For it was alleged on his part, that there was no default or negligence in him, for he had a sufficient guard, the goods were all locked up under hatches, the thieves came as press masters, and by force robbed the ship, and that the same was *vis major*, and that he could not have prevented the same. And lastly, that though he was called master, or *exercitor navis*, yet he had no share in the ship; and was but in the nature of a servant acting for a salary. But notwithstanding it was adjudged for the plaintiff; for at his peril he must see that all things be forthcoming that are delivered to him, let what accident soever happen; (the act of God, or an enemy, perils and dangers of the sea only excepted) but for fire, thieves and the like, he must answer, and is in the nature of a common carrier; and that though he receives a salary, yet he is a known and public officer, and one that the laws look upon to answer; that the

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plaintiff hath his election to charge either master or owners, or both at his pleasure, but can have but one satisfaction.

Master answerable for goods lost from the ship's boat.

If a master shall receive goods at the wharf or quay, or send his boat for the same, and they happen to be lost, he shall likewise answer by the marine law and the common law.

Sailing contrary to an embargo.

If goods be loaden aboard, and after an embargo or restraint from the prince or state comes forth, and then he breaks ground, or endeavours to sail away, if any damage accrues, he must be responsible for the same. The reason is, because his freight is due and must be paid, nay although the very goods be seized as contraband.

Must not sail in bad weather.

He must not sail in tempestuous weather, nor put forth to sea, without first having consulted with his company; nor must he stay in port or harbour without just cause, when a fair wind invites his departure.

Must not overload his ship.

He must not overcharge, or load his ship above the birth mark, or take into his ship any persons of an obscure and unknown condition, without letters of safe conduct.

Nor ought he to load any of his merchant's goods aboard any of the king's enemies ships, admitting his own vessel leaky or disabled, without letters of safe conduct, otherwise the same may be made prize, and he must answer the damage that follows the action.

Nor shall he come or sneak into the creeks, or other places, when loaden homewards, but into the king's great ports (unless he be driven in by tempest) for otherwise he forfeits to the king all his merchandize, and therefore must answer.

MASTERS OF SHIPS.

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Nor ought he to ship any merchandize, but only at the public ports and quays.

Must not load with prohibited goods.

He must not load any prohibited or unlawful goods, whereby the whole cargo may be in danger of confiscation, or at least subject to seizure or surreption.

He may not set sail without able and sufficient mariners both for quality and number.

False colours.

He may not use any unlawful colours, ensigns, pendants, jacks or flags, whereby his ship or loading may incur a seizure, or the cargo receive any detriment or damage.

Embezzlement and robbery.

He must not suffer the loading to be stolen, or embezzled; if the same be, he must be responsible, unless it be where there is a *vis major*, as if he be assaulted at sea, either by enemies, ships of reprisal, or pirates; there if no fault nor negligence was in him, but that he performed the part of an honest, faithful and valiant man, he shall be excused: yet it hath been adjudged, that if a merchant ship lies in a port or haven, and a pirate, sea-rover, or other thieves enter her, and overpower her men, and then rob her, the master must be responsible; but if an enemy enter and commit the depredation, there the master is excused.

False papers.

He must not carry any counterfeit cockets, or other fictitious and colourable ship papers, to involve the goods of the innocent with the nocent.

Port duties.

Nor must he refuse the payment of the just and ordinary port duties and charges, customs and imposts, to the hazard of any part of his loading; yet if he offers that which is just, then he is excused.

Sailing without sufficient rigging.

He must not set sail with insufficient rigging or tackle, or with other or fewer cables than is usual

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and requisite, respect being had to the burden of the vessel: and if any damage happen by the delivery of the goods into the lighter, as that the ropes break, and the like, there he must answer; but if the lighter comes to the wharf or quay, and then in taking up the goods the rope breaks, the master is excused and the wharfinger is liable.

Master answerable for embezzlement of goods sent from the ship in lighters.

If fine goods, or the like, are put into a close lighter, and to be convoyed from the ship to the quay, it is usual there, that the master sends a competent number of his mariners to look to the merchandize; if then any of the goods are lost, and imbezzled the master is responsible and not the wharfinger; but if such goods are to be sent aboard a ship, where the wharfinger at his peril must take care the same be preserved.

Duty in port.

After his arrival at port, he ought to see the ship be well moored and anchored, and after reladed not to depart or set sail until he hath been cleared; for if any damage happens by reason of any fault or negligence in him or his mariners, whereby the merchant or the loading receives any detriment, he must answer the same.

And as the law ascribes these things, and many more to him as faults, when committed by him or his mariners in ports, so there are other things which the law looks upon to be as faults in him in his voyage, when done.

Deviation.

As if he deviates in his course without just cause, or steers a dangerous and unusual way, when he may have a more secure passage, though to avoid illegal impositions, he may somewhat change his course; nor may he sail by places infested with pirates or enemies, or other places notoriously known

to be unsafe, nor engage his vessel amongst rocks, or remarkable sands, not being thereto necessitated by violence of wind or weather, or deluded by false lights. Art. II.

By the marine law, he that will charge a master with a fault, as in relation to his duty, must not think that a general charge is sufficient in law, but he ought to assign and specify the very fault wherewith he is so charged.

So that he that will infer, that such or such a sad disaster hath happened, or been occasioned by reason of some fault in the mariners, must not only prove the fault itself, but must also prove, that the fault did dispose to such a sad event, or that such a misfortune could not have happened without such a fault precedent.

Owners responsible for the contracts of the master.

When voyages are undertaken, the master is put in by the owners, and they ought to make good the master's fact and deed; and therefore as the whole care and charge of ship and goods are committed to the master, it is the prudence of the owners to be careful who they will admit commander of their ship, since their action subjects them to answer the damage, or whatever other act he shall do in reference to his employment; and therefore he can freight out the vessel, take in goods and passengers, mend and furnish the ship; and to that effect, if need be, in a strange country, he may borrow money with advice of his mariners upon some of the tackle, or sell some of the merchandize. If part of the goods shall be sold, in such necessity, the highest price that the remainder are sold for, must be answered and paid to the merchant; after which the merchant must pay for the freight of those goods,

Art. II. as well as for the remainder, Leg. Oleron 1. But if the ship in the voyage happens to be cast away, then only shall be tendered the price that the goods were bought for.

By the common law the master of a ship could not impawn the ship or goods; for there is no property either general or special in him, nor is such power given him by the constituting him a master.

Yet, the common law hath held the law of Oleron reasonable, that if a ship be at sea and takes leak, or otherwise want victuals or other necessaries, whereby either herself is in danger, or the voyage may be defeated; in such case of necessity the master may impawn for money, or other things, to relieve such extremities by employing the same to that end; and therefore he being the person trusted with the ship and voyage, may reasonably be thought to have that power given to him implicitly, rather than to see the whole lost.

Master may impawn the ship for necessaries.

But not for his own debt.

But a master for any debt of his own cannot impawn, or hypothecate, the ship, &c. for the same is no ways liable, but in cases of necessity for the relief, and completing of the voyage.

Cannot sell the ship.

Nor can he sell or dispose of the same without an authority or license from the owners; and when he does impawn or hypothecate the vessel or furniture, he ought to have the advice and consent of his mariners.

And when the ship is so engaged, she is for ever obliged, and the owners are thereby excluded till redemption.

But in regard masters might not be tempted to engage the owners, or trouble them with such sort of obligation, but where there is very apparent

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cause and necessity, they seldom suffer any to go shipper or master, but he that hath a share or part in her; so that if monies or provisions be taken up, he must bear his equal share and proportion with the rest.

Nor can the master on every case of necessity impawn the vessel or furniture; for if she be freighted, and he and the owners are to join in the laying in of the provision for the voyage, and perhaps he wants money, (a great sign of necessity) yet can he not impawn the vessel or furniture, any other or further than for his own part or share in her, which he may transfer and grant as a man may do an eighth or fifth in lands or houses: but such obligation of the vessel must be in foreign parts or places, where the calamity or necessity is universal on the vessel that will oblige all the owners.

Mariners assisting to save goods from wrecks. They shall have a compensation for their exertions out of the articles saved.

If the vessel happens afterwards to be wrecked or cast away, and the mariners by their great pains and care, recover some of the ruins and loading, the master in that case may pledge the same; the product of which he may distribute amongst his distressed mariners, in order to the carrying them home to their own country: but if the mariners have no ways contributed to the salvage, then their reward is sunk and lost with the vessel. And if there be any considerable part of the loading preserved, he ought not to dismiss his mariners without advice from the loaders or freighters; for otherwise he may be made liable for damage.

If merchants freight a vessel at their own charges, and set her to sea, and she happens afterwards to be weather-bound, the master may impawn either ship or loading at his pleasure, or at

Art. II. When the master cannot obtain money on loan he may sell part of the loading for use of the ship.

least such as he can most conveniently raise monies on, rather than see the whole voyage lost. And if he cannot pawn the loading, he may sell the same, that is, so much as is necessary; in all which cases his act obliges the owners.

However orders and instructions are as carefully to be looked upon and followed as the magnet.

MARINERS.

ARTICLE III.

Of Mariners.

Art. III.

Denominations of persons on board ships.

THE persons ordinary for sailing in ships, have divers denominations: the first, which is the master, is known to us and by most nations, both now and of old, and especially by the Roman laws is termed *navicularius*, or *magister*, or *exercito navis*, in English rendered *master;* in the Teutonic, *skipper;* by the Grecians, *navarchus* or *nauclerus;* by by the Italians, *patrono*. But this is only to those vessels that are ships of burthen and carriage: for in ships of war the principal officer is commonly called commander or captain. The next in order of office to the master, is he who directs the ship in the course of her voyage; by the French called *pilote*, by the English *pilot*, and by the Flemmings *steersman*, by the Romans *gubernator*, by the Italians *nochiero*, *pillotto*, and *navarchus;* and the third is esteemed the master's mate or companion, especially if the master be steersman himself; of old by the Grecians and Romans called *proreta;* his charge is to command all before the mast.

His successor in order, is the carpenter or shipwright, by these two nations of old, called *naupegus* and *calaphates*. From the loins of one of that rank, sprang that great emperor Michael, sirnamed *Calaphates*, who denied not to own the quality of his father among his regal titles. The very name *Calaphates*, the Venetians and most of the Italians still use to this day.

Art. III. The next who succeeds in order, is he who bears the charge of the ship's boat, by the Italians called *brachiere*, and by the Grecians and Romans, *carabita*, from *Carabus*, which denotes the boat of a ship.

The sixth in order, especially in ships of burden, is the clerk or purser, by the Italians called *scrivano*, whose duty is the registering and keeping the accounts of all received in, or delivered out of the ship; for all other goods that are not by him entered, or taken into charge, if they happen to be cast over-board in a storm, or are stolen or embezzled, the master answers them not, there being no obligation on him by law for the same; his duty is to unlade by day, not night.

The seventh is a most necessary officer, called the cook.

The eighth is the ship's boy, who keeps her continually in harbours, called of old by the Grecians, *namphylakes*, by the Italians, *guardino;* these persons are distinct in offices and names, and are likewise distinguished in hires and wages. The rest of the crew are under the common name of mariners, by the Romans called *nautæ;* but the tarpaulins, or those youths or boys that are apprentices, obliged to the most servile duties in the ship, were of old called *mesonautæ*.

Authority of the master. The master hath the supreme rule on shipboard, and by that means his power and authority is by law much countenanced, especially in the keeping of his crew in peace, so long as they eat his bread; and if a mariner shall happen to be bruised or hurt in doing his duty and service, the master is

to take care that he be carefully looked after, in order to the procuring his recovery; and if it be occasioned by the miscarriage of another on ship-board, he may refund the damage out of his wages, but still remembering who gave the assault.

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Seamen injured in the ship's service.

If it happens that a master commands his boat to be manned out, and it so falls out that the same is out of order, the accoutrements being insufficient; if the mariners happen to be drowned, the master is to repay by the law marine, one whole year's hire to the heirs of the drowned: therefore masters ought carefully to view, and see that the boat be fit for men to trust their lives in upon his command.

If a mariner shall commit a fault, and the master shall lift up the towel three times before any mariner,* and he shall not submit, the master at the next place of land may discharge him; and if he refuses to go ashore, he shall lose half his wages, and all his goods within the ship. If the mariner shall submit, and the master will not receive him, he shall have his full wages: or if the mariner shall depart the ship on the master's command, and the master happens not to take another, if any damage happens to ship or goods, the master must answer.

Seamen committing offences.

Mariners must help one another at the sea and in port; if any refuse, upon the oaths of his fellows, he loseth his wages. None of the crew must, or ought to leave the ship without leave of the master,

Mariners must assist one another.

* This has certainly been taken from the laws of Oleron, art. 13, (see vol. i, p. xxvii,) and is an erroneous translation of the article. The words of the article are "Oter la touaille," which is no more than to forbid the mariner his mess.—*E.*

Art. III.

Must not leave the ship.

when he comes to a port, or rides at anchor, but always constantly to wait upon her till they are discharged, or have leave at least, and one half to be left on ship-board.

Seamen arrested for debt.

A mariner may not carry out of the ship above one meal's meat, but drink, not a drop; and when on ship-board, ought not there to be arrested for debt, but only so much of his wages in the hands of the master attached: yet this is doubted, if it be not a sworn debt, that is, a judgment or sentence, or a penalty to the king.

Must not leave the ship without permission.

They ought not to depart from on ship-board when once admitted into their full pay, (which is always when they break ground) without license of the master; and before they may so do, they are to leave a sufficient number to guard the ship and decks.

If the ship breaks ground and sets sail, if after she arrives at her desired port, their full pay continues till she returns; nor may they in anywise depart from on ship-board without leave or license of the master; if they do, and any disaster happens, they must answer: yet at such port if the vessel be well moored and anchored with two cables, they may go without leave: so as they leave a sufficient number behind them to guard the decks: but then, their return must be in due season; for if they make an unreasonable stay, they must make satisfaction.

Mariners injuring one another.

If mariners get drunk and wound one another, they are not to be cured at the charge of the master of the ship; for such accidents are not done in the service of the ship: but if any of the mariners be anyways wounded, or fall ill in the service of the ship, he is to be provided for at the charges of the

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ship; and if he be so ill as not fit to travel, he is to be left ashore, and care to be taken that he hath all accommodations of humanity administered to him: and if the ship is ready for her departure, she is not to stay for him; if he recover, he is to have his full wages, deducting the master's charges laid out for his account.

Goods thrown overboard.

In case of a storm, if goods are cast overboard for lightening the ship, the oaths of the mariners, swearing that it was done for the preservation of the vessel and the rest of the loading, shall discharge the master.

So goods damnified at sea, are cleared by the oath of the masters and mariners, by the laws of Oleron.

Assaults on the master.

To assault the master on ship-board, is a crime that subjects the mariner's hand to be cut off, unless he redeems it at five *sols*.

Ship seized for debt, mariners to receive their wages.

If a ship happens to be seized for debt, or otherwise to become forfeited, the mariners must receive wages, unless in some cases, where the wages are forfeited as well as the ship; as if they have letters of marque, and instead of that they commit piracy; by reason of which there ensues a forfeiture of all: but loading of prohibited goods aboard a ship, as wood, and the like, though it subjects the vessel to a forfeiture, yet it deprives not the mariner of his wages; for the mariners having honestly performed their parts, the ship is tacitly obliged for their wages: but if the ship perishes at sea, they lose their wages, and the owners their freight.' And this being the marine custom, is allowed by the common law as well as the civil law.

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The courts at Westminster have been very favourable to mariners, in order to the suing for wages; for at the common law they cannot join, but must sue all distinct and apart for their wages.

Mariners may join in suits in the admiralty.

Yet in the admiralty they may all join, and the courts of Westminster will not grant a prohibition: and so it was ruled, where one Jones, a master of a ship, was sentenced in the admiralty for wages at the suit of poor mariners; a prohibition being prayed upon a suggestion that the contract was made at land, and not *super altum mare;* the court denied it, for that he came too late, sentence being given below against him: yet if the mariners had only libelled, and there had been no sentence, and the defendant had prayed a prohibition, as above, the court would have denied it. This has been, and is usually done.

Suits for repairs cannot be brought in the admiralty.

But the court will be very well informed that the libel is for the mariners' wages; for some who work carpenter's work, and such like labour aboard a ship in a haven or port within the realm, (which is *infra corpus comitatus*, (notwithstanding those great and ingenious objections against it) and must be tried by the common law, and not elsewhere) will libel under that cloke for mariners' wages. But the court in that case will grant a prohibition. And so it was done in the like case.

But if the ship rides at anchor in the sea, and the master sends his boat ashore for victuals or other provisions for the ship, and accordingly the providore or slop-seller does bring victuals and provisions aboard; in that case, if the contract be made there, it must be sued for in the admiralty: but if

the goods are by the purser or mariners contracted for at land, they must sue at common law. Art. III.

If goods are so embezzled, or so damnified that the ship's crew must answer, the owners and master must deduct the same out of their freight to the merchants, and the master out of the wages of the mariners; for though freight is the mother of wages, yet it is the very father of damage: for before the mariner can claim his wages out of what the ship has earned, the ship must be acquitted from the damage that the merchant hath sustained by the negligence or fault of the mariners: and the reason is, for that as the goods are obliged to answer the freight, so the freight and ship is tacitly obliged to clear the damages; which being done, the mariners are then let into their wages. Wages of mariners must contribute to embezzlement.

If a mariner be hired, and deserts the service before the voyage ended, by the marine law he loses his wages: and the same custom at common law pleaded, it hath been conceived will bar him. Mariner deserting.

If a mariner shall commit any wilful or negligent fault, by reason of which the master, owners, or the ship answers damage to the merchant, an action lies well against him. Mariner to answer for damages arising from his neglect.

If a mariner takes up monies or clothes, and the same is entered into the purser's book, by the custom of the marine it is a discount or a receipt of so much of their wages as the same amounts to: and in an action brought by them for their wages the same shall be allowed; and is not accounted mutual, the one to bring his action for the clothes, and the other for his wages.

A master of a ship may give moderate and due correction to his mariners, and if they bring an ac- Master may correct mariners moderately.

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tion against him, he may justify the same at the common law; and by the law of Oleron, if a mariner shall assault the master, he is to pay five sols, or lose his hand; as above.

Master may retain a part of the wages of mariners as a security for the performance of their contract.

Mariners after they have unloaded the ship, if they demand their wages, and there be any suspicion of their departure, the master may detain a reasonable proportion of the same, until they bring back the ship, or give security to serve out the whole voyage.

Barratry of the mariners is a disease so epidemical on shipboard, that it is very rare for a master be his industry ever so great, to prevent it. A span of villany on shipboard soon spreads out to a cloud, for no other cause but that of circular encouragement that one knavish mariner gives another.

Master responsible for the faults of the mariners.

However, the law does in such cases impute offences and faults committed by them, to be negligences in the master: and were it otherwise, the merchant would be in a very dangerous condition.

The reasons why he ought to be responsible are, for that the mariners are of his own choosing, and under his correction and government, and know no other superior on shipboard but himself; and if they are faulty, he may correct and punish them, and justify the same by law; and likewise, if the fact is clearly proved against them, may reimburse himself out of their wages.

Master responsible for goods lost or embezzled.

And therefore in all cases wheresoever the merchant loads aboard any goods or merchandize, if they be lost, or embezzled, or any otherwise damnified, he must be responsible for them: for the very loading them aboard makes him liable; and that as well by the common law, as the marine law.

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Master answerable for goods lost from the ship's boat.

Nay, if the mariners go with the ship's boat to the quay or wharf to fetch goods on shipboard, if once they have taken charge of them, the master becomes immediately responsible if they steal, lose, damnify or imbezzle them.

The most ancient record of that nature that is now extant is that in Edward the third's time, where one brought an action of trespass against the master for the embezzlement by his mariners of twenty-two pieces of gold, bow, sheaf of arrows, sword, and other things, which it was adjudged the master should answer: which judgment was certified into chancery, in order to have it sent into the king's-bench, to enable the plaintiff to bring an action upon the same in any place in England, where he could meet with the defendant.

Where the master shall not be responsible for goods on board the ship.

The master's being subject to answer damage, is to be understood in all such cases where the loading was brought aboard, either by his consent or purser's; for any other, or such as shall be secretly brought in, not being entered in the purser's book, or in bills of loading, the master is not obliged to see forthcoming, unless it be such goods as the parties bring into the ship about them; as clothes, money and the like, as above; those things being seldom entered, yet most commonly those that are visible, the master by law is responsible for.

So likewise if a master forewarn a passenger to keep his goods, and that he will no ways take care of them; and if they be lost or purloined by the crew, he will not be obliged to see them forthcoming, and is not thereby held responsible in case of a loss; especially if there be no precedent agreement thereunto.

Art. III. But if the goods shall be sent aboard a ship, and the master shall appoint a cabin for the same, and deliver the key to the owner, and tell him he will not be responsible if a loss happens; yet if the goods are stole, he must notwithstanding make satisfaction.*

* That goods once delivered to a master, the cargo is not subject to be attached in his hands; nor can any custom whatsoever support the same; for they are in law, as it were, bailed to the ship until the freight and all other charges are paid, and it is very much doubted whether an attachment can be made in London, of any goods at all lying on shipboard in the river of Thames, which is yet the port of London, notwithstanding freight and all other charges are paid off.

LAWS OF THE UNITED STATES

FOR THE

REGULATION OF SEAMEN, &c.

LAWS OF THE UNITED STATES, &c.

An Act for the Government and Regulation of Seamen in the Merchants Service.[a]

SECTION I.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States, to any foreign port,* or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state, to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on

Master and mariners in the merchants service to execute a shipping agreement.

[a] Laws of the United States, vol. i, p. 134.

* It has been frequently contended in the district court, and with success, that the penalties of this section do not attach, in consequence of an omission to enter the names of mariners on the articles, who have been shipped on board vessels of the United States, to perform a voyage commencing from a foreign port. As a penal statute, a strict construction has been given to the law, and the words descriptive of the voyage, during the performance of which the names of the seamen are directed to be entered on the articles, fully justify this construction. But where the quantity of provisions directed by the 9th section of this law have not been furnished to the ship, and the crew have been put on short allowance, those seamen who have been shipped at a foreign port have received the compensation allowed by that section See the case of Gardner et al, *vs.* the ship New Jersey, ante page 223.

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board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel, shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping:* *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act.†

Master failing so to do subject to penalty.

* See a note in the case of Jameson, *vs.* the ship Regulus, ante page 212, in which it is stated, that a verbal agreement for less than the highest wages, may be proved.

† But although from the penalties and forfeitures contained in this act, the seaman who has not signed articles is entirely exempted, yet is he not discharged from the obligations imposed on him by the general maritime law. By the principles of that system he is still governed, and to its penalties he is subject. Jameson, *vs.* the Regulus, ante page 212.

Sec. H.

Mariners failing to perform their agreement, what penalty subjected to.

Sec. 2. *And be it enacted*, That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner,* and shall in like manner note the time that he so neglected to render himself, (after the time appointed) every such seaman or mariner shall forfeit for every

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By the 2d Geo. II, chap. 36, all contracts with seamen are directed to be in writing under a penalty of five pounds for each mariner carried to sea without a written agreement. See Abbot, page 266. Phila. ed.

The contracts with seamen are, by the Ordinances of Louis XIV, directed to be particularly set forth in writing, and if this is neglected, the oath of the mariner is to be received as evidence of the existence and nature of the contract. Appendix, vol. 2, page xxx.

* It has been decided in the district court, that the entry directed by this section to be made on the log-book, in case a seaman shall neglect to render himself on board at the time appointed, may be read in evidence. But to oppose the statement in the log-book, the mariner is permitted to bring forward any legal testimony in his power. Malone *vs.* the brig Mary, vol. i, p. 140. Evidence to shew that a time was allowed for the seaman to render himself on board, different from the time appointed in the articles, has also been admitted. Idem, p. 141.

Sec. II.

Mariner neglecting to render himself on board, or deserting.

hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town or county within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.*

* Frequent decisions in our courts of common law, have determined that the obligations of the security of a seaman do not end until the seaman has actually proceeded to sea with the ship on board which he entered. Recoveries from securities, of the penalty in a case of the desertion of a seaman, have taken place, when the seaman had left the ship after she had sailed from Philadelphia, and before she had passed the capes of Delaware.

By the British statutes on this subject the neglect or refusal of a seaman to perform his contract is punished by a forfeiture of all the wages due to him; and he is also subjected to an imprisonment from 14 to 30 days. 2 Geo. II, c. 36, § 3 & 4. 31 Geo. III, c. 39, § 3. Abbot, 106. The first article of the Laws of Wisbuy declares, that a seaman who hires himself to a master and leaves him, shall refund the wages received, and pay half as much more as the master promised him for the whole voyage. Appendix, vol. 1, p. lxix.

VESSEL UNFIT FOR SEA.

Sec. III.

Vessel leaky or unfit to perform her voyage, what proceedings shall be had for ascertaining the same.

Sec. 3. *And be it enacted*, That if the mate, or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun, (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions or stores, to proceed on the intended voyage, and shall require such unfitness to be enquired into, the master or commander shall upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such enquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town or place, taking with him two or more of the said crew who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept directed to three persons in the neighbourhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of, and to make report to him the said judge or justice, in writing under their hands, or the hands of two of them, whether in any, or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions or stores, or what repairs or alterations in the body, tackle or apparel will be necessary; and upon such report the said judge or justice shall adjudge and determine, and shall endorse on the said report his

Sec. III. judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made, or deficiencies supplied where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear upon the said report and judgment, to have been without foundation, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs or alterations as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common gaol of the county, there to remain without bail or mainprize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman

Master, &c. to pay costs.

Sec. IV.

or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings. *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus, and an examination then to be had, to detain him for the causes herein before assigned.

Penalty for harbouring runaway seamen.

Sec. 4. *And be it enacted*, That if any person shall harbour or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town or county where he, she or they may reside, shall forfeit and pay ten dollars for every day which he, she or they shall continue so to harbour or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States;* and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage

* By the 48th article of the Laws of the Hanse Towns, a penalty is imposed on masters of ships, enticing mariners from ships on board of which they may be employed, and the seaman who shall yield to the temptation offered to him, is obliged to compensate the master of the ship with whom he was first engaged, by a payment of a sum equal to half the sum he was to have received from him,

Sec. V.

for which such seaman or mariner engaged shall be ended.[a]

Mariner absenting himself from duty, penalty on, and how to be proceeded against.

Sec. 5. *And be it enacted*, That if any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board;* and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages:[b] but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and

[a] See Laws of Wisbuy, art. 6. Appendix, vol. i, p. lxx.

[b] See the case of Whitton et al. *vs.* the brig Commerce, p. 160, also, Jones *vs.* the brig Phœnix, p. 201.

* The maritime laws of every state are particularly careful in regulating the conduct of seamen when the vessel to which they belong is in port, and in imposing heavy penalties in case of absence. See the Laws of Oleron, art. v. xx. Laws of Wisbuy, art. i. iv. xvii. xxxiii. liv. Laws of the Hanse Towns, art. xx. xxii. xl. xliii. Ord. of France, book ii, tit. 3, art. ii. iii. v. See also the case of Malone *vs.* William Bell, ante page 139.

moreover shall be liable to pay to him or them all damages which he or they may sustain, by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in any court or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards. Sec. VI.

When and at what port entitled to demand his wages.

Sec. 6. *And be it enacted*, That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him at every port where such ship or vessel shall unload and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract:* and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages

* By the contract with seamen shipping on board of vessels sailing from the port of Philadelphia, it is usually expressly stipulated, that no more wages than those which are advanced when the agreement is made, shall be paid until the return of the ship. This is a provision often required by the convenience of the owners, and has relation only to the time and place of payment of the wages; but it is not to be so construed as to destroy the claim of the seamen to wages, in case of capture or loss, during the voyage. On the completion of any section of a voyage, for which the vessel receives her freight, or by legal construction has earned it, the right of the seamen to wages becomes complete, and is not to be disturbed by any subsequent casualty. Such a clause as this in the articles has no other operation than to prevent the claim of the seaman to his wages thus earned, being brought forward in a foreign port. See the case of Johnson *vs.* Sims, p. 215, also p. 189. *note*.

Sec. VI.

How to recover them if withheld.

which shall be then due according to his contract:* and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to shew cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or

When process against the ship may issue.

appearing, shall not shew that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of com-

* For a decision of the question—"When a seaman at the last port of delivery may sue for his wages" see the case of Edwards *vs.* the brig Susan, p. 165.

On the subject of this section, see the Laws of Oleron, art. xvii. Laws of Wisbuy, art. xxxi. Laws of the Hanse Towns, art. xxviii.

Sec. VII.

plaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

Log-book to be produced by the owners or master.

Sec. 7. *And be it enacted*, That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear by due proof that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common goal of the city, town or place,

Mariner deserting at any port or place, how to be proceeded against and punished.

To be imprisoned.

Sec. IX.

there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.[a]

Every ship or vessel outward bound to be furnished with a medicine chest;

Sec. 8. *And be it enacted*, That every ship or vessel belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled: and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of, in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.[b]

Penalty on the master for default.

Ships, &c. bound across the Atlantic, what supply of provisions and water shall be laid in.

Sec. 9. *And be it enacted*, That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leav-

[a] Laws of the Hanse Towns, art. xliii.

[b] Walton et al. *vs.* the ship Neptune, p. 152.

Sec. IX.

ing the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores and live-stock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh or bread, during the voyage, the master or owner of such ship or vessel shall pay to each of the crew one day's wages beyond the wages agreed on for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.*

Penalty for failure.

* The construction which this section has received, is stated at large in the case of Mariners *vs.* the ship Washington, p. 220; and also in the case of Gardner *vs.* the ship New Jersey, p. 223,

Sec. II.

CHAP. II.

*An Act for the Relief and Protection of American Seamen.**

SECTION I.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the president of the United States, by and with the advice and consent of the senate, be, and hereby is authorized to appoint two or more agents; the one of whom shall reside in the kingdom of Great Britain, and the others at such foreign ports, as the president of the United States shall direct. That the duty of the said agents shall be, under the direction of the president of the United States, to enquire into the situation of such American citizens or others, sailing, conformably to the law of nations, under the protection of the American flag, as have been, or may hereafter be impressed or detained by any foreign power; to endeavour, by all legal means, to obtain the release of such American citizens or others, as aforesaid; and to render an account of all impressments and detentions whatever, from American vessels, to the executive of the United States.

Two agents to be appointed.

Their duty.

Sec. 2. *And be it further enacted*, That if it should be expedient to employ an additional agent or agents, for the purposes authorized by this law, during the recess of the senate, the president alone

Additional agents may be appointed during the recess of the senate.

* Laws of the United States, vol. iii, p. 322.

be, and hereby is, authorized to appoint such agent or agents. Sec. IV.

Appropriation.

Sec. 3. *And be it further enacted*, That the president of the United States be, and he is hereby authorized to draw, annually, out of the treasury of the United States, a sum not exceeding fifteen thousand dollars, not otherwise appropriated to be applied by him, in such proportions as he shall direct, to the payment of the compensation of the said agents, for their services, and the incidental expenses attending the performance of the duties imposed on them by this act.

Collectors to grant certificates of citizenship.

Sec. 4. *And be it further enacted*, That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of the United States of America, and producing proof of his citizenship, authenticated in the manner hereinafter directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form, that is to say: "I, A. B. collector of the district of D. do hereby certify, That E. F. an American seaman, aged years, or thereabouts, of the height of feet inches, [describing the said seaman as particularly as may be,] has, this day, produced to me proof in the manner directed in the act, intitled,—"An act for the relief and protection of American seamen;" and, pursuant to the said act, I do hereby certify, that the said E. F. is a citizen of the United States of America: In witness whereof, I have hereunto set my hand and seal of office, this day of ." And it shall be the duty of the collectors aforesaid, to file and preserve the proofs of citizenship produced as aforesaid: And for each

Sec. V.

certificate delivered, as aforesaid, the said collectors shall be entitled to receive, from the seaman applying for the same, the sum of twenty-five cents.

Sec. 5. And, in order that full and speedy information may be obtained of the seizure or detention, by any foreign power, of any seamen employed on board any ship or vessel of the United States, *Be it further enacted*, That it shall, and hereby is declared to be the duty of the master of every ship or vessel of the United States, any of the crew whereof shall have been impressed or detained by any foreign power, at the first port at which such ship or vessel shall arrive, if such impressment or detention happened on the high seas, or if the same happened within any foreign port, then in the port in which the same happened, immediately to make a protest, stating the manner of such impressment or detention, by whom made, together with the name and place of residence of the person impressed or detained; distinguishing also, whether he was an American citizen; and if not, to what nation he belonged. And it shall be the duty of such master to transmit by post, or otherwise, every such protest made in a foreign country, to the nearest consul or agent, or to the minister of the United States resident in such country, if any such there be; preserving a duplicate of such protest, to be by him sent immediately after his arrival within the United States, to the secretary of state, together with information to whom the original protest was transmitted: and in case such protest shall be made within the United States, or in any foreign country, in which no consul, agent or minister of the United States resides, the same shall, as soon thereafter as

In case of the impressment or detention of seamen, master of the ship to make a protest, &c.

Sec. VIII.

practicable, be transmitted by such master, by post or otherwise, to the secretary of state.

Secretary of state and secretary of the treasury to transmit this act.

Sec. 6. *And be it further enacted*, That a copy of this law be transmitted by the secretary of state, to each of the ministers and consuls of the United States resident in foreign countries, and by the secretary of the treasury, to the several collectors of the districts of the United States, whose duty it is hereby declared to be from time to time, to make known the provisions of this law, to all masters of ships and vessels of the United States entering, or clearing at their several offices. And the master of every such ship or vessel shall, before he is admitted to an entry, by any such collector, be required to declare on oath, whether any of the crew of the ship or vessel under his command have been impressed or detained, in the course of his voyage, and how far he has complied with the directions of this act: and every such master, as shall wilfully neglect or refuse to make the declarations herein required, or to perform the duties enjoined by this act, shall forfeit and pay the sum of one hundred dollars. And it is hereby declared to be the duty of every such collector, to prosecute for any forfeiture that may be incurred under this act.

Master of ship to make oath before admission to an entry.

Penalty on masters of ships violating this act.

Collectors to send a list, &c. to the secretary of state every three months.

Sec. 7. *And be it further enacted*, That the collector of every port of entry in the United States shall send a list of the seamen registered under this act, once every three months, to the secretary of state, together with an account of such impressments or detentions, as shall appear, by the protests of the masters to have taken place.

Limitation of parts of the act.

Sec. 8. *And be it further enacted*, That the first, second and third sections of this act, shall be

Sec. VIII. in force for one year, and from thence to the end of the next session of Congress thereafter, and no longer.*

* These sections are revived and continued in force for one year by an act passed March 2d, 1799.

Sec. II.

CHAP. III.

*An Act for the Relief of Sick and Disabled Seamen.**

SECTION I.

Twenty cents per month to be deducted from the wages of seamen, coming from a foreign voyage in a vessel of the United States

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of September next, the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen, that shall have been employed on board such vessel since she was last entered at any port in the United States, and shall pay to the said collector, at the rate of twenty cents per month for every seaman so employed; which sum he is hereby authorized to retain out of the wages of such seamen.

The same with respect to the coasting trade.

Sec. 2. *And be it further enacted,* That from and after the first day of September next, no collector shall grant to any ship or vessel whose enrolment or license for carrying on the coasting trade has expired, a new enrolment or license before the master of such ship or vessel shall first render a true account to the collector, of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the

* Laws of the United States, vol. iv, p. 223.

Sec. IV.

license which has so expired, and pay to such collector twenty cents per month for every month such seamen have been severally employed as aforesaid; which sum the said master is hereby authorized to retain out of the wages of such seamen. And if any such master shall render a false account of the number of men, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay one hundred dollars.

Penalty on the master rendering a false account of the same.

Collectors to make returns of the sums received, which shall be expended in relieving sick and disabled seamen.

Sec. 3. *And be it further enacted*, That it shall be the duty of the several collectors to make a quarterly return of the sums collected by them, respectively, by virtue of this act, to the secretary of the treasury; and the president of the United States is hereby authorized, out of the same, to provide for the temporary relief, and maintenance of sick or disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or, in ports where no such institutions exist, then in such other manner as he shall direct: *Provided*, That the monies collected in any one district, shall be expended within the same.

Monies unexpended and donations to be invested in stock.

Sec. 4. *And be it further enacted*, That if any surplus shall remain of the monies to be collected by virtue of this act, after defraying the expense of such temporary relief and support, that the same, together with such private donations as may be made for that purpose (which the president is hereby authorized to receive) shall be invested in the stock of the United States, under the direction of the president; and when, in his opinion, a sufficient fund shall be accumulated, he is hereby authorized to purchase or receive cessions or donations of ground or buildings, in the name of the United

Provision for building marine hospitals.

Sec. V.

States, and to cause buildings, when necessary, to be erected as hospitals for the accommodation of sick and disabled seamen.

Directors of the marine hospitals to be appointed.

Sec. 5. *And be it further enacted*, That the president of the United States be, and he is hereby authorized to nominate and appoint, in such ports of the United States, as he may think proper, one or more persons, to be called directors of the marine hospital of the United States, whose duty it shall be to direct the expenditure of the fund assigned for their respective ports, according to the third section of this act; to provide for the accommodation of sick and disabled seamen, under such general instructions as shall be given by the president of the United States, for that purpose, and also subject to the like general instructions, to direct and govern such hospitals as the president may direct to be built in the respective ports: and that the said directors shall hold their offices during the pleasure of the president, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed. And the said directors shall render an account of the monies received and expended by them, once in every quarter of a year, to the secretary of the treasury, or such other person as the president shall direct; but no other allowance or compensation shall be made to the said directors, except the payment of such expenses as they may incur in the actual discharge of the duties required by this act.

Their duties.

Sec. II.

CHAP. IV.

*An Act in addition to "An Act for the Relief of Sick and Disabled Seamen."**

SECTION I.

Manner of expending monies collected.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the president of the United States shall be, and he hereby is authorized to direct the expenditure of any monies which have been or shall be collected by virtue of an act, entitled "An act for the relief of sick and disabled seamen," to be made within the state wherein the same shall have been collected, or within the state next adjoining thereto, excepting what may be collected in the states of New Hampshire, Massachusetts, Rhode Island, and Connecticut; any thing in the said act contained to the contrary thereof, notwithstanding.

Secretary of the navy to deduct a certain sum from the pay of the navy.

Sec. 2. *And be it further enacted,* That the secretary of the navy shall be, and he hereby is authorized and directed to deduct, after the first day of September next, from the pay thereafter to become due, of the officers, seamen and marines of the navy of the United States, at the rate of twenty cents per month, for every such officer, seaman and marine, and to pay the same

* Laws of the United States, vol. iv, p. 497.

quarter annually to the secretary of the treasury, to be applied to the same purposes, as the money collected by virtue of the above mentioned act is appropriated. Sec. III.

Sec. 3. *And be it further enacted*, That the officers, seamen and marines of the navy of the United States, shall be entitled to receive the same benefits and advantages, as by the act above mentioned are provided for the relief of the sick and disabled seamen of the merchant vessels of the United States. Officers seamen, &c. of the navy entitled to the benefits of the act.

Sec. II.

CHAP. V.

*An Act to revive and continue in force certain parts of the "Act for the Relief and Protection of American Seamen," and to amend the same.**

SECTION I.

Parts of the act revived.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first, second and third sections of the act, intituled "An act for the Relief and protection of American Seamen," shall be and hereby are revived and continued in force for one year.

Duty of the secretary of state.

Sec. 2. *And be it further enacted*, That the secretary of state shall be, and hereby is required to lay before congress, within ten days after the commencement of each ordinary session, an annual statement, containing an abstract of all the returns made to him by the collectors of the different ports, pursuant to the said act, and of the communications received by him, from the agents employed by virtue of the same, in foreign countries.

* Laws of the United States, vol. iv, p. 502.

CHAP. VI.

*An act to amend an act, intituled "An Act for the Relief of Sick and Disabled Seamen," and for other purposes.**

SECTION I.

Fund provided for the relief of sick and disabled seamen.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the monies heretofore collected in pursuance of the several acts "for the relief of sick and disabled seamen," and at present unexpended, together with the monies hereafter to be collected by authority of the before-mentioned acts, shall constitute a general fund, which the president of the United States shall use and employ as circumstances shall require for the benefit and convenience of sick and disabled American seamen: *Provided,* That the sum of fifteen thousand dollars be, and the same is hereby appropriated for the erection of an hospital in the district of Massachusetts.

President may cause accommodations, &c. to be provided for the relief of the United States seamen at New Orleans with the consent of the local government.

Sec. 2. *And be it further enacted,* That it shall be lawful for the president of the United States to cause such measures to be taken as, in his opinion, may be expedient for providing convenient accommodations, medical assistance, necessary attendance, and supplies for the relief of sick or disabled seamen of the United States, who may be at or near the port of New Orleans, in case the same can be done with

* Laws of the United States, vol. vi, p. 174.

Sec. III.

the assent of the government having jurisdiction over the port; and for this purpose, to establish such regulations, and to authorize the employment of such persons as he may judge proper; and that for defraying the expense thereof a sum not exceeding three thousand dollars be paid out of any monies arising from the said fund not otherwise appropriated.

Masters of boats, rafts, &c. going to New Orleans, down the Mississippi to make reports of the number of hands, &c.

Sec. 3. *And be it further enacted*, That from and after the thirtieth day of June next, the master of every boat, raft or flat, belonging to any citizen of the United States, which shall go down the Mississippi with intention to proceed to New Orleans shall, on his arrival at fort Adams, render to the collector or naval officer thereof, a true account of the number of persons employed on board such boat, raft or flat, and the time that each person has been so employed, and shall pay to the said collector or naval officer at the rate of twenty cents per month, for every person so employed, which sum, he is hereby authorized to retain out of the wages of such person: and the said collector or naval officer shall not give a clearance for such boat, raft or flat, to proceed on her voyage to New Orleans, until an account be rendered to him of the number of persons employed on board such boat, raft or flat, and the money paid to him by the master or owner thereof: and if any such master shall render a false account of the number of persons, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay fifty dollars, which shall be applied to, and shall make a part of, the said general fund for the purposes of this act: *Provided*, That all persons employed in navigating any such boat, raft or

Penalty for rendering a false account.

Persons navigating such boats, to be considered as seamen of the United States.

flat, shall be considered as seamen of the United States, and entitled to the relief extended by law to sick and disabled seamen. Sec. VI.

President to appoint a director of the marine hospital at New Orleans.

Sec. 4. *And be it further enacted*, That the president of the United States be, and he is hereby authorized to nominate and appoint for the port of New Orleans, a fit person to be director of the marine hospital of the United States, whose duties shall be in all instances the same as the directors of the marine hospital of the United States, as directed and required by the act, intituled "An Act for the Relief of Sick and Disabled Seamen."

Sick foreign seamen may be admitted in certain cases.

Sec. 5. *And be it further enacted*, That each and every director of the marine hospitals within the United States, shall, if it can with convenience be done, admit into the hospital of which he is director, sick foreign seamen, on the application of the master or commander of any foreign vessel to which such sick seamen may belong; and each seaman so admitted shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, the payment of which the master or commander of such foreign vessel shall make to the collector of the district in which such hospital is situated: and the collector shall not grant a clearance to any foreign vessel, until the money due from such master or commander, in manner and form aforesaid, shall be paid; and the director of each hospital is hereby directed under the penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital, under his direction, and render the same to the collector.

Seamen admitted into the hospital subject to a charge for every day they shall remain therein.

Accounts against foreign seamen to be made out by the director of the hospital.

Sec. 6. *And be it further enacted*, That the collectors shall pay the money collected, by virtue of

Sec. VII.

Collectors to pay the money they collect into the treasury of the U. States.

Director of the marine hospital to account for the money received by him.

this and the act to which this is an amendment, into the treasury of the United States, and be accountable therefor, and receive the same commission thereon, as for other money by them collected.

Sec. 7. *And be it further enacted*, That each and every director of the marine hospitals, shall be accountable at the treasury of the United States for the money by them received in the same manner as other receivers of public money, and for the sums by them expended shall be allowed a commission at the rate of one per cent.

CHAP. VII.

*An Act supplementary to the "Act concerning Consuls and Vice-Consuls, and for the further Protection of American Seamen."**

SECTION I.

BE it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs, a list containing the names, places of birth and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall moreover enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive on his return thereto, and then and there also produce the persons named therein to the said boarding officer, whose duty it

Master of vessels to deliver lists to the collectors of the ports whence they go from the United States of their ship's companies, containing descriptions of their persons, &c. Certified copies to be delivered to the masters: fees to be paid for them.

Master to enter into bonds.

For what conditioned.

* Laws of the United States, vol. vi, p. 206.

Sec. II.

shall be to examine the men with such list, and to report the same to the collector; and it shall be the duty of the collector at the said port of arrival, (where the same is different from the port from which the vessel originally sailed) to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed: *Provided*, That the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew as aforesaid; nor on account of any such person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the collector.

Provisions in favour of the captains.

Masters of vessels belonging to the United States arriving in foreign ports, to deliver to the consuls, &c. there certain papers.

Sec. 2. *And be it enacted*, That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States, who shall sail from any port of the United States, after the first day of May next, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport, with the consul, vice-consul, commercial agent, or vice-commercial agent, (if any there be at such port;) that in case of refusal or neglect of the said master or commander, to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit

Penalty for not doing it.

of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to the said master or commander all of his said papers: *Provided*, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement. Sec. III.

Acts to be done upon the discharge of American seamen in foreign ports.

Sec. 3. *And be it further enacted*, That whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul, or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of Ame-

Sec. IV.

rican seamen who may be destitute, and may be in such foreign port, and the several sums retained for such fund shall be accounted for with the treasury every six months by the persons receiving the same.*

Consuls, &c. to provide for destitute seamen, &c. subsistence and passages to the United States, subject to the instruction of the secretary of state.

Sec. 4. *And be it further enacted*, That it shall be the duty of the consuls, vice-consuls, commercial agents, vice-commercial agents of the United States, from time to time to provide for the mariners and seamen of the United States, who may be found destitute within their districts respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give: and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, commercial agents, or vice-

Commanders of vessels required to take such on board if not more than two to every hundred tons.

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* The following are the provisions of the act to which this is a supplement. See Laws of the United States, vol. ii, p. 94.

Provision for mariners left in foreign ports.

Sec. 7. *And be it further enacted*, That to prevent the mariners and seamen, employed in vessels belonging to citizens of the United States, in cases of shipwreck, sickness or captivity, from suffering in foreign ports, it shall be the duty of the consuls and vice-consuls, respectively, from time to time to provide for them in the most reasonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give, and not exceeding an allowance of twelve cents to a man per diem; and all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and en-

Sec. IV.

commercial agents, respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several abilities: *Provided*, That no master or captain of any ship or vessel, shall be obliged to take a greater number than two men to every one hundred tons burthen of the said ship or vessel, on any one voyage: and if any such captain or master shall refuse the same on the request or order of the consul, vice-consul, commercial agent, or vice-commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States, in any court of competent jurisdiction. And the certificate of any

On terms not exceeding ten dollars each.

Seamen, &c. to do duty if able.

Penalty on the refusal of the captain or master.

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joined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls or vice-consuls respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, free of costs or charge; but that the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several abilities: *Provided*, That no master or captain of any ship or vessel, shall be obliged to take a greater number than two men to every one hundred tons burthen of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same on the request or order of the consul or vice-consul, such captain or master shall forfeit and pay the sum of thirty dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States, by the said

Sec. VI.

such consul or commercial agent, given under his hand and official seal, shall be *prima facie* evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty aforesaid.

Seventh and eighth sections of the act concerning consuls and vice-consuls repealed.

Sec. 5. *And be it further enacted*, That the seventh and eighth section of the act, intituled "An Act concerning Consuls and Vice-Consuls," be and the same are hereby repealed; and that the secretary of state be authorized to reimburse the consuls, vice-consuls, commercial agents or vice-commercial agents, such reasonable sums as they may heretofore have advanced for the relief of seamen, though the same should exceed the rate of twelve cents a man per diem.

Secretary of state to reimburse the consuls, &c.

Consuls, &c. may receive fifty cents for every certificate of discharge, and 2 1-2 per cent. on paying and receiving the wages of discharged seamen in foreign ports.

Sec. 6. *And be it further enacted*, That it shall and may be lawful for every consul, vice-consul, commercial agent and vice-commercial agent of the United States, to take and receive for every certificate of discharge of any seaman or mariner in a foreign port fifty cents; and for commission on pay-

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consul or vice consul in his own name, in any court of competent jurisdiction.

Duty of masters of vessels respecting discharged seamen, and of consuls neglecting it.

Sec. 8. *And be it further enacted*, That where a ship or vessel belonging to citizens of the United States is sold in a foreign port or place, the master, unless the crew are liable by their contract or do consent to be discharged there, shall send them back to the state where they entered on board, or furnish them with means sufficient for their return, to be ascertained by the consul or vice-consul of the United States, having jurisdiction of the port or place. And in case of the master's refusal, the said consul or vice-consul may (if the laws of the land permit it) cause his ship, goods and person to be arrested and held until he shall comply with his duty herein.

Sec. IX.

ing and receiving the amount of wages payable on the discharge of seamen in foreign ports, two and a half per centum.

Consuls, &c. giving false certificates subject to fine and imprisonment.

Sec. 7. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall falsely and knowingly certify, that property belonging to foreigners is property belonging to citizens of the United States, he shall on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding ten thousand dollars at the discretion of the court, and be imprisoned for any term not exceeding three years.

For false passports, &c. subject to fines.

Sec. 8. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States, he shall on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding one thousand dollars.

Powers of attorney, &c. executed in foreign countries to be verified by consuls, &c. who may receive fifty cents on each.

Sec. 9. *And be it further enacted*, That all powers of attorney executed after the thirtieth day of June next in a foreign country for the transfer of any stock of the United States, or for the receipt of interest thereon, shall be verified by the certificate of a consul, vice-consul, commercial agent, or vice-commercial agent, if any there be at the place where the same shall be executed, for which the person giving the certificate shall receive fifty cents.

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